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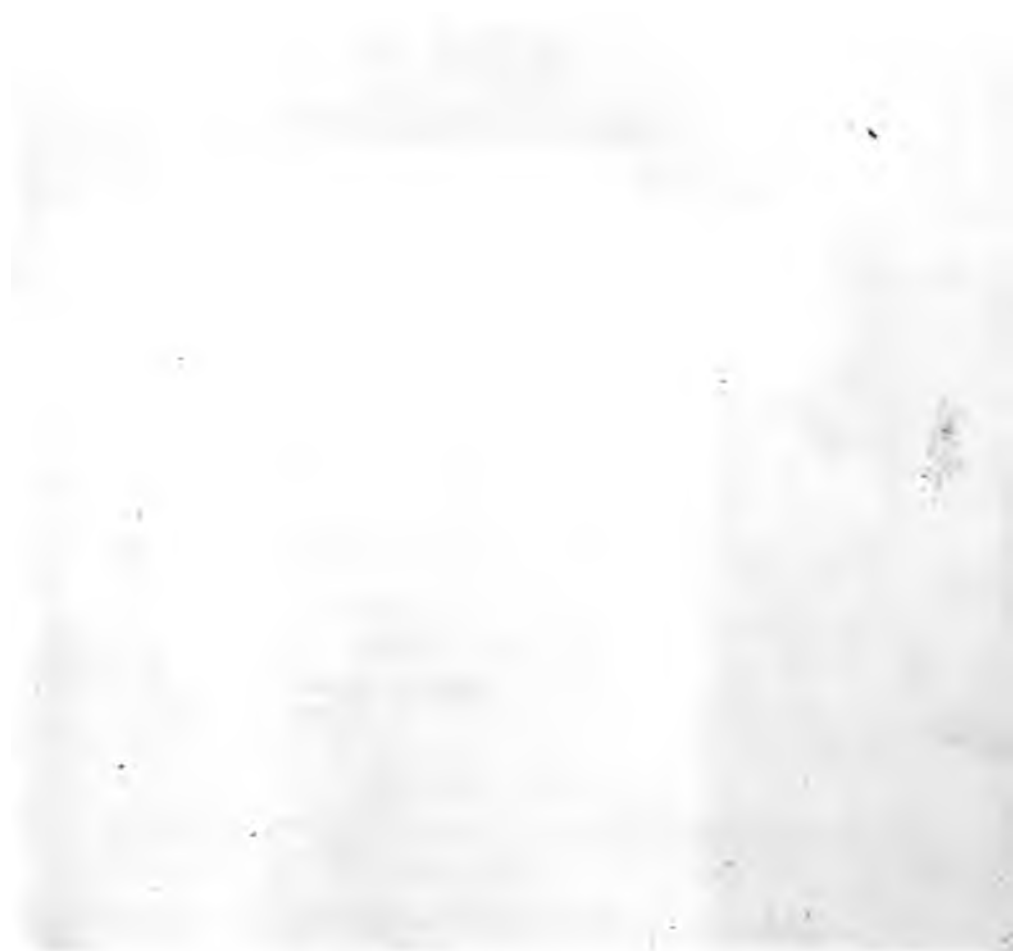
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R E P O R T S
OF
C A S E S
ARGUED AND DETERMINED
IN
The Court of King's Bench.

**WITH TABLES OF THE NAMES OF THE CASES
AND THE PRINCIPAL MATTERS.**

BY
RICHARD VAUGHAN BARNEWALL, of LINCOLN'S INN,
AND
CRESSWELL CRESSWELL, of THE INNER TEMPLE, ESQs.
BARRISTERS AT LAW.

V O L. IV.
Containing the Cases of EASTER, TRINITY, and MICHAELMAS Terms,
in the 6th Year of GEO. IV. 1825.

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for A. 21. 178. Mr.

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C A S E S

ARGUED AND DETERMINED

1825.

IN THE

Court of KING's BENCH,

IN

Easter Term,

In the Sixth Year of the Reign of GEORGE IV.

TURNER *against* HAYDEN and Another.

Wednesday,
April 20th.

ASSUMPSIT by the indorsee against the acceptor of two bills of exchange. At the trial before *Abbott C.J.* at the *London* sittings after *Hilary* term, it appeared that the bills, which were accepted payable at *Marsh and Co.'s, Berners-Street*, respectively became due on the 21st and 31st of *August*. *Marsh and Co.* stopped payment on the 13th of *September*; the bills were never presented at their banking-house, but were presented to the defendants on the 21st of *September*. At the time when the bills became due, and thenceforth until and at the time of *Marsh and Co.'s* stoppage, the amount of the bill: Held, that the latter was not discharged by the omission to present the bill for payment, the acceptance being in law a general acceptance.

Where the holder of a bill of exchange, accepted payable at a bankers, but not made payable "there only," did not present it for payment, and the banker about three weeks afterwards failed, having had in his hands during all that time a balance in favor of the acceptor exceeding the

VOL. IV.

B

defendants

1825.

TURNER
against
HAYDEN.

defendants had a balance in their hands exceeding the amount of the bills. *Scarlett*, for the defendants, contended, that they were not liable, as they had sustained a loss exceeding the amount of the bills in consequence of the laches of the plaintiff in not presenting them within a reasonable time after they became due. The Lord Chief Justice overruled the objection, and directed the jury to find a verdict for the plaintiff, but gave the defendants leave to move to enter a nonsuit; and now

Scarlett moved accordingly. It cannot be contended, that the holder of a bill is precluded from recovering if he neglects to present it for payment on the very day when it becomes due. But if he does not present it within a reasonable time, and a prejudice is in consequence sustained by the acceptor, he is discharged. A bill accepted payable at a banker's, is like a cheque on a banker. The latter must be presented in a reasonable time, otherwise the drawer is discharged if a prejudice arises from the laches of the holder. If the holder does not present the bill when due he should give notice to the acceptor that he has not done so. In *Sebag v. Abitbol* (a) it was held that the acceptor was not discharged because he had received such notice.

ABBOTT C. J. In *Sebag v. Abitbol*, Lord Ellenborough thus defines laches: "Laches is a neglect to do something which by law a man is obliged to do;" and he proceeds, "Whether my neglect to call at a house where a man informs me that I may get the money amounts to laches, depends upon whether I am obliged

(a) 4 M. & S. 462.

to call there." Now the law did not oblige this plaintiff to present the bills at *Marsh and Co.'s*; we cannot therefore say that he has been guilty of laches because he omitted to do so.

1825.

TURNER
against
HAYDEN.

BAYLEY J. The 1 & 2 G. 4. c. 78. says, that such an acceptance as that given by the defendants shall have the effect of a general acceptance, and then the holder is not bound to present the bills at any particular time or place. Acceptance at a particular place is for the benefit of the acceptor, and he should enquire into the state of his account. I think, therefore, that the verdict in this case was right.

Rule refused.

LOWEN *against* KAYE.

Thursday,
April 21st.

TRESPASS for breaking and entering the plaintiff's close and destroying his fences. Plea, not guilty. At the trial before *Alexander C. B.* at the last *Spring* assizes for the county of *Hertford*, it appeared that the defendant was surveyor of the highways for the parish of *Cheshunt*, and in that character had removed certain fences of the plaintiff, which were in front of his house, for the purpose of widening the road, which at that part was not more than twenty-four feet in breadth. By the sixth section of the Highway Act, 13 G. 3. c. 78., it is enacted, "that no bush, tree, &c. shall be permitted to stand or grow in any highway within the distance of fifteen feet from the centre thereof (except for ornament or shelter to the house, building, or court-yard of the

A surveyor of highways is not authorised under the 13 G. 3. c. 78. s. 6. & 64., to remove a fence in front of a house for the purpose of widening the road, which in that part was not more than twenty-four feet in breadth, unless the fence be on the highway.

1825.

**LOWEN
against
KATZ.**

owner thereof); but the same shall be cut down by the owner within ten days after notice by the surveyor." The 64th section recites that inconveniences had arisen from making hedges or other fences, and from ploughing or breaking up the soil of lands near the middle or centre of highways, and enacts, "that if any person shall encroach by making a hedge or other fence on any highway, not being turnpike road, within the distance of fifteen feet from the middle or centre thereof, where the breadth of the highway is described with certainty, and does not exceed in breadth thirty feet, every person so offending shall forfeit for every such offence forty shillings." It then empowers the surveyor to take down such hedge or fence. It was contended, that from the two sections, taken together, it clearly appeared to be the intention of the legislature that there should be neither trees nor fences within fifteen feet from the centre of the road; and that when the road was less than thirty feet wide, the surveyor was authorized to widen it by removing trees and fences. The Lord Chief Baron was of opinion that it was a question for the jury whether the fence which had been removed stood upon land which had anciently been road, or upon the soil of the plaintiff. The jury found that it stood upon the plaintiff's soil, and gave a verdict for him, with 5*l.* damages.

Jessopp now moved for a nonsuit, or new trial, on the ground urged at the trial.

Per Curiam. The Highway Act does not say that every highway shall be thirty feet wide. The sixth section directs the removal of trees and shrubs within
fifteen

fifteen feet of the centre of the road. The 64th section recites that inconveniences had arisen from making hedges or other fences near the centre of highways, and then enacts, "that if any person shall encroach by making any hedge, ditch, or fence, *on* any highway, every person so offending shall be liable to a penalty; and the surveyor is empowered to remove such hedge, ditch, or fence. Unless the fence be *on* the highway the party erecting it is not guilty of any offence against the statute; nor is the surveyor authorized to remove it. The question, therefore, was properly submitted to the jury, whether the fence was erected on the highway; and they having found that it was not, the plaintiff was entitled to recover.

1825.

 LOWEN
 against
 KAYE.

Rule refused.

STIERNELD *against* HOLDEN and Another.Thursday,
April 21st.

TROVER for eighty bags of coffee. Plea, the general issue. At the trial before *Abbott C. J.*, at the *London* sittings after *Hilary* term, the following appeared to be the facts of the case. The plaintiff was consignee of the coffee in question, which arrived in this country from *Demarara*, in *November* 1823. The plaintiff was at that time abroad, having on his departure authorised one *Stewart* to indorse in his name any bills of lading that might arrive from *Demarara*, and to sell the goods. On the 25th of *November*, a letter addressed to the

Where goods were placed in the hands of a factor for sale, and he indorsed the bills of lading to the defendants, who thereupon accepted a bill for him, and he at the same time directed the defendants to sell the goods, and reimburse themselves the amount of the

bill out of the proceeds: Held, that the defendants, having sold the goods, could not be sued for them in trover by the original owner.

Semble, That he might have maintained money had and received for the proceeds, and that the defendants could not have retained the amount of the money advanced to the factor.

B 3

plaintiff,

1825.

STERNWELD
against
HOLDEN.

plaintiff, and containing the bills of lading of the coffee in question, was opened by *Stewart*, and on the following day he indorsed and delivered them to the defendants, who thereupon accepted for him a bill for 1500*l.*, which he immediately discounted, and applied the proceeds to his own use. At the time when the bill was accepted, *Stewart* directed the defendants to sell the coffee, and to reimburse themselves the amount of the proceeds. The defendants at this time knew that the coffee was consigned to the plaintiff, and that *Stewart* was a mere agent, and had no property in it. On the 3d of *December* the defendants sold the coffee for 1508*l.* 7*s.* 6*d.* *Stewart* stopped payment on the 28th of *November*, but that was unknown to the defendants at the time of the sale of the coffee. On the 6th of *December* the plaintiff sent them notice not to sell the coffee. Upon this state of facts the Attorney General contended that *Stewart* had power to authorise a sale of the coffee, and that as the defendants sold it before that authority was revoked, the present action could not be maintained. The Lord Chief Justice was of that opinion, and nonsuited the plaintiff, giving him leave to move to enter a verdict for the proceeds of the coffee, and now

Marryat moved accordingly. The coffee was clearly deposited by *Stewart* with the defendants, by way of pledge for the amount of the bill accepted by them. Now *Stewart* was a mere factor, having no power to pledge, and he was known to be so by the defendants. They were, therefore, guilty of a conversion, by assuming a dominion over goods which came to their hands under such circumstances, *M'Combie v. Davies* (a),

(a) 6 *East*, 538.

Lovell v. Martin (a), *Truettel v. Barandon*. (b) *Featherstone v. Johnson* (c) is a much stronger case, for there the defendant did not know at the time when he sold the goods that the party by whom they were consigned to him was not the owner, yet the sale was held to be a conversion. [*Bayley J.* Was there any evidence in this case that the defendants sold the coffee prematurely, and to the plaintiff's prejudice, in order to cover their advance to *Stewart* ?] No, but if they had not in the first instance improperly received the goods by way of pledge, the plaintiff would have obtained the whole of the proceeds.

1825.

STEWART
against
HOLDEN:

BAYLEY J. I am of opinion that the present action is not maintainable, and that the nonsuit was proper. It appears that *Stewart*, when he indorsed the bills of lading to the defendants, directed them to sell the coffee, and at the same time gave them authority to hold the goods or the proceeds as a security for the sum of 1500*l.* which they advanced to him. The authority to hold the goods by way of pledge was void, but the authority to sell was good and valid, that being within the scope of his duty as factor. It is admitted that the defendants did not make a premature and improvident sale in order to cover their advance, but that the goods were sold in the usual course of business. Two authorities then were given to the defendants, the one valid, the other void, and they acted under the former. That cannot make them guilty of a conversion so as to subject them to this action. But it is said that they applied the proceeds of the goods to the payment of their advances, that indeed

(a) 4 *Taunt.* 799.(b) 1 *B. M.* 543.(c) 8 *Taunt.* 237.

1825. may be a misapplication of the money, and a sufficient ground for an action for money had and received to the use of the plaintiff, but is not a conversion of the goods themselves. For these reasons I think that the nonsuit ought not to be disturbed.

STEWART
against
HOLROYD.

HOLROYD and LITLEDALE Js. concurred.

Rule refused.

ABBOTT C. J. took no part in the discussion.

Thursday,
April 31st.

DAVIS against MORGAN.

A. being seised of an ancient mill, together with a stream of water diverted out of a river, and flowing from thence unto her mill, and *B.* being possessed of other mills, together with a stream of water diverted out of the same river, above the stream of *A.*, by means of a head wear, and flowing from thence through the lands of *A.* down to *B.*'s mills, as appurtenant to the same: *B.* erected upon other lands below the lands of *A.*, and near the said watercourse, two other mills, whereby it becoming necessary for him (*B.*) to have a larger supply of water, he widened and deepened his watercourse in the soil of *A.*, and raised and heightened the head wear, and thereby diverted the greatest part of the water into the watercourse for the use of his mills, so that the water was prevented from flowing down to the mill of *A.* so copiously as it had formerly done, and thereby *A.*'s mill became of no use. *A.* having recovered damages in one action against *B.* on this account, and having afterwards brought a second action for subsequent damages, in order to prevent all further disputes *B.* agreed to take a grant from *A.* of the use and benefit of the watercourse so widened and deepened, and of the liberty of diverting the water out of the river. By lease reciting these facts, *A.*, in consideration of 1500*l.* paid by *B.*, demised to *B.* the use of the watercourse so widened and deepened as aforesaid, and the free liberty of diverting so much of the water of the river into and along the watercourse as should be necessary for the use of *B.*'s mills habendum for the use of ninety-nine years, if three persons therein named should so long live, at an annual rent. Soon after the execution of this deed *A.*'s mill was destroyed. *B.*, or those claiming under him, continued to enjoy the watercourse and the use of the water during the term, and paid the rent. The lease having determined by the death of the last surviving cestui que vie, the person claiming under the grantee continued to enjoy the watercourse in the manner described in the grant, and paid rent for it. The reversion in the lands, upon which *A.*'s mill formerly stood, having vested in *C.*, it was held that the latter might maintain indebitatus assumpsit for the use and occupation of the watercourse and the water running therein, against the persons who claimed under *B.*

and

and across the said river, stream, or watercourse, and of the liberty or privilege of continuing and keeping the said wear at a certain height, to wit, the height to which the same had been theretofore raised; and also of certain lands and premises by the defendant, and at his special instance and request, and by the sufferance and permission of the plaintiff, for a long time before then elapsed, had held, used, occupied, possessed, and enjoyed. Plea, non-assumpsit. At the trial before *Little-dale J.*, at the *Monmouth* Spring assizes 1825, the following appeared to be the facts of the case: For several years before the 26th of *June* 1764, Lady *Ann Hamilton* had been seised or possessed of an ancient corn or grist mill, together with an ancient course or stream of water diverted out of the river *Gwilly*, in the county borough of *Carmarthen*, and flowing from thence, down, unto, and for the use and service of the said mill, as appurtenant to the same. And *Robert Morgan*, the grandfather of the defendant, had also for several years been possessed of three ancient mills, called the *Priory Mills*, situate in the said county borough, together with a certain ancient course or stream of water diverted out of the river *Gwilly*, above the said stream of Lady *Hamilton*, by means of a head wear formerly erected across the same river, and running and flowing from thence, between and through the lands of divers persons, and particularly through certain lands of Lady *H.*, down unto, and for the use and service of his mills as appurtenant to the same. And he had lately and newly, before *June* 1764, erected upon other lands below the lands of Lady *H.*, and on or near to the said last mentioned watercourse, an iron furnace, two rolling mills, and other works; and it thereby became

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came necessary for him to have a much larger supply of water for the use and service of his mills and new erected works, than had theretofore usually flowed along the said last mentioned watercourse; and he had, therefore, then lately widened and deepened the said last mentioned watercourse, in the soil and freehold of Lady *H.*, within her said lands, for the purpose of receiving and conveying a greater quantity of water for the use and service of his mills and new erected works, and likewise raised and heightened the said head wear across the river *Gwilly*, about twenty-one inches higher than the same was before, and ought to have been, and thereby diverted the greatest part of the water of the river *Gwilly* into the said watercourse, for the use and service of his mills and new erected works; so that the water of the river was prevented from flowing in its ancient course down to the mill of Lady *H.* in so copious a manner as it had theretofore done, and thereby the mill of Lady *H.* *became of no use* for the want of a sufficient supply of water for working the same. Lady *H.* in 1762 brought an action against *R. Morgan*, and recovered 30*l.* damages and costs, by reason of the deepening and widening of the watercourse; and afterwards brought a second action in the Court of Exchequer for the recovery of subsequent damages sustained by her. In order to put an end to the same, and prevent all further suits and disputes, *R. Morgan* agreed to take a grant and lease from Lady *H.*, of the use and benefit of the watercourse so widened and deepened, and of the liberty of diverting so much of the water of the river *Gwilly* into and along the same, as should be convenient for the use and service of the mills and new erected works of him, *R. Morgan*. By lease of the 26th June 1764, re-

1764, reciting the facts above stated, Lady *H.*, in consideration of the sum of 1500*l.* paid to her by *R. Morgan*, granted and demised to the said *R. Morgan*, his executors, &c., all the full and free use and benefit of the said watercourse within the lands of her, Lady *H.*, in the same manner as it was then widened and deepened as aforesaid, and the full and free liberty of diverting and turning so much of the waters of the river *Gwilly* into and along the said watercourse, as should be necessary and convenient for the use and service of the said mills and new erected works of him, *R. Morgan*. Habendum from the 24th *June* then last past, for ninety-nine years, if three persons therein named should so long live, at a rent of sixpence per annum. The deed contained the following clause: "And the said Lady *H.*, for the considerations aforesaid, doth for herself and her heirs, acquit, release, and discharge *R. Morgan*, his executors, &c., of and from all actions, causes of action, trespasses, damages, and demands whatsoever, at any time heretofore accrued or arisen, for or by reason of the widening or deepening of the said watercourse, or diverting the water into and along the same, for the use of the mills and new erected works of him, the said *R. Morgan*." Soon after the execution of this lease, Lady *Hamilton*'s mill was pulled down, and the grantee and those who claimed under him continued the watercourse, widened and deepened as described in the lease, and the use of the water as thereby granted, until the expiration of the term. The lease expired in *November* 1823, by the death of the then last surviving cestui que vie. The reversion in the lands, which formerly belonged to Lady *Hamilton*, had become vested in the plaintiff; and the defendant, the grandson of *R. Morgan* the lessee, being

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in possession of the *Priory Mills*, had paid rent to the plaintiff, and had treated with him for a renewal of the grant. Upon this evidence it was objected at the trial, that the action was not maintainable, because there was no consideration for the promise. It was admitted that the waiver of a tort was a good consideration for a promise, but it was urged that the plaintiff could not have maintained any action for a tort, because he could not shew any right to the use of the water, neither he nor those under whom he claimed having had any mills for a period of sixty years. And, secondly, assuming that such an action might be maintainable, it ought to have been brought by the occupiers of the lands, and not by a mere reversioner. The learned Judge was of opinion, that after the expiration of the term for which the privilege was granted, the grantor or the persons claiming under her, might maintain an action for a tort; for, by the recitals in the grant of 1764, it was admitted that *Morgan* the grantee had committed a wrongful act by deepening and widening the watercourse, and continuing it so deepened and widened, as against him or the person claiming under him; therefore, it must be taken that the act of continuing it so deepened and widened would have been a wrongful act, except for the permission granted by Lady *H.* When the term, therefore, for which that permission was granted, expired, the grantee, or the party claiming under him, was guilty of a wrongful act by continuing the watercourse so deepened and widened; and the grantor or those claiming under her might maintain an action for a tort: it was not necessary, however, to decide the case upon that point, because, by taking the grant, the grantee admitted that Lady *H.* had a right to grant, and the rent having been paid during the term,

term, the title of the grantor was admitted till the end of the term, and the grantee or the party claiming under him having after the end of the term continued to occupy the wear by not taking it down, use and occupation was maintainable against him. The tenants of the plaintiff could not have maintained this action, for although the soil might have been granted to them for a term, yet it must have been subject always to the grant of the watercourse.

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A verdict was found for the plaintiffs subject to the award of an arbitrator, and liberty was reserved to the defendant to move to enter a nonsuit. *Campbell* now moved accordingly, and relied upon the objections taken at the trial.

ABBOTT C. J. I am of opinion that the plaintiff was entitled to recover. It cannot be denied that the defendant had received great benefit from continuing the wear and the watercourse in the state to which it had been brought many years before. The bringing it into that state was a wrongful act by the defendant's ancestor, and *Lady Hamilton*, through whom the plaintiff claims, complained of this act, and recovered damages in an action. A contract was then made between her and the defendant's ancestor to grant the free use and benefit of the watercourse to the defendant's ancestor for ninety-nine years, determinable on three lives. It is true, that after this agreement *Lady H.* abandoned the use of her own mill, and perhaps the consideration for her so doing may have been the rent payable by the defendant. The lease has expired, and the defendant having continued to enjoy the benefit of the watercourse, he must be taken to have continued the enjoyment of it by the permission of the owner of the estate, which formerly belonged to the

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the grantor, and that was a benefit to the defendant, though no prejudice to the plaintiff. The question is, whether the plaintiff is to have any thing for this benefit which the defendant has received. If he is not, the 1500*l.* paid to the plaintiff's ancestor must be a consideration, not only for the release of damages which had then actually been incurred, but for the enjoyment of the privilege for ever. That, clearly, was not the intention of the parties. I think, therefore, that the defendant having received a benefit by the permission of the plaintiff, there was a good consideration for the promise, and consequently the plaintiff is entitled to recover.

BAYLEY J. *Lady Hamilton* was entitled many years ago to the enjoyment of the water, and it was wrongfully applied by the defendant's ancestor to his use. *Lady Hamilton* consented that the defendant's ancestor should have the use of the water for ninety-nine years, determinable by the death of the survivor of three persons agreed upon. At the expiration of the lease, *Lady Hamilton*, or her real representative, had a right to have things returned to their former state, and the defendant, at that time, could have no right to have the extra quantity of water which he enjoyed under his lease. Now, as she had sold the use of the water for a certain time only, unless there be some unequivocal act by the defendant to shew that he ceased to use it by her permission, or that of the person who claimed under her, it is clear that she or the person claiming under her is entitled to a reasonable compensation for the use of the water so enjoyed by her permission.

LITTLEDALE J. concurred.

Rule refused.

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FORMAN and FOTHERGILL *against* DREW.Friday,
April 22d.

THIS was an action upon two promissory-notes, of which one was for 65*l.* 5*s.*, made by one *Norris*, payable to the defendant, and by him indorsed to the plaintiffs. The other was for 16*l.* 17*s.* 6*d.*, made by the defendant payable to *Thomas Webb*, and by him indorsed to the plaintiffs. Plea, that the defendant was discharged, under the insolvent debtor's act, on the 1st of *March* 1822. Replication, that he was not discharged, and issue thereon. At the trial before *Little-dale J.* at the *Spring* assizes for *Monmouth* 1825, the plaintiffs proved the hand-writing of the maker and indorser of the notes; and further, that they were given to *Thomas Webb* for coals shipped to defendant under the following circumstances: The plaintiffs carried on business, at *Newport*, in *Monmouthshire*, under the name of the *Argood Coal Company*, and employed *Thomas Webb* as their agent at that place. Between *February* and *June* 1821, he shipped to the defendant five cargoes of coals (the property of the plaintiffs). An invoice was sent to the defendant with each cargo, and all the invoices were made out in the name of the *Argood Coal Company*. In a letter of the 9th of *March* 1821, to the defendant, *Webb* stated to him that *Fothergill* owned a great part of the invoices had been made out in the name of the *Argood Coal Company*, which in fact consisted of two partners only, one of whom had never been named to the insolvent as having a share in the concern, and the insolvent in his schedule, described a debt of 82*l.*, due to *A. B.*, of *N.* in *Monmouthshire*, for coals, in respect of which, it was stated that *A. B.* held a security, which was the subject of the present action, and the debt due to the plaintiffs was 82*l.* 2*s.* 6*d.*, it was held, that the schedule contained a sufficient description, of the names of the persons to whom the insolvent was indebted, and the amount of the debt, within the meaning of the statute.

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the concern; and afterwards, in conversation with the defendant, on the latter urging *Webb* to take a bill, he said that he could not, for if he did so he should be blamed by *his employers*. *Webb* left the plaintiffs' service in *November* 1821, and he heard nothing of defendant's application to be discharged until after that time; and he never mentioned the subject to the plaintiffs. The defendant proved that he was discharged under the insolvent debtor's act on the 1st of *March* 1822. In his schedule there was the following entry: "1820, 1821. Mr. *Thomas Webb*, *Pillgwenlly, Newport, Monmouthshire*, 82*l.* admitted, for coals. He holds a bill of exchange drawn by Mr. *Norris* upon and indorsed by me. Date and other particulars I cannot state." The description of the debt in the order of discharge was similar to that contained in the schedule. It was objected that this was no discharge as to the debt due to the plaintiffs; first, because their debt was 82*l.* 2*s.* 6*d.*, and the debt mentioned in the schedule was 82*l.*; and, secondly, because the debt in the schedule was described as a debt due to *Webb*, and not to the plaintiffs. *Little-dale J.* inclined to think that the debt was sufficiently described to inform the plaintiffs that the defendant sought to be discharged in respect of the debt due to them, and he nonsuited the plaintiffs, but reserved liberty to them to enter a verdict for the amount of the notes and interest, if the Court should be of opinion that the defendant had not been duly discharged as to the debt due to the plaintiffs.

W. E. Taunton now moved accordingly. A party is only discharged in respect of the debts duly described in his schedule, and specified in the order of the Court.

Now

Now here there was no debt in the schedule corresponding in amount with that due to the plaintiffs; and, secondly, the schedule did not contain an account of any debt due to the plaintiffs, but only of a debt due to *Webb*. It did not contain a full and true description or the person to whom the prisoner was indebted, or who to his knowledge and belief had a claim to be a creditor according to the provisions of the statute 1 G. 4. c. 119. s. 6. Now here the defendant knew by the invoices that the persons constituting the *Argood Coal Company* were the parties with whom he contracted. This was not therefore so far a debt due to *Webb* that the defendant could, if sued by the plaintiffs, have set off a debt due to him from *Webb*, *Rabone v. Williams* (a), *George v. Claggett*. (b) Nor could *Webb* have maintained an action in his own name against the defendant for the price of the coals. The defendant, therefore, has not described fully the persons to whom he was indebted; nor has the Court specified in the order of discharge the debt due to the plaintiffs.

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ABBOTT C. J. The statute 1 G. 4. c. 119. s. 6. requires that the prisoner shall within a certain time after presenting his petition, deliver into the court a schedule containing a full and true description of every person to whom such prisoner shall be then indebted, or to his or her knowledge or belief shall claim to be his or her creditor, together with the nature and amount of such debts and claims respectively. By section 16., after such petition and schedule shall have been filed, the court are to cause notice thereof to be given to the

(a) 7 T. R. 360.

(b) 7 T. R. 359.

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creditor at whose suit the prisoner shall be detained, and to the other creditors named in the schedule, or to such of them as the court shall think fit, and to be inserted in the *London Gazette* and other newspapers, and it then authorises any of the creditors to oppose the prisoner's discharge. The object of these provisions is, that the creditors of the insolvent should have notice of his application to the court to be discharged under the act, and I think the words of the sixth section ought to receive a liberal construction. If we were to construe them literally, it would follow as a consequence that an insolvent who had traded with a company (not a corporation), would be compelled to insert in his schedule the names of all the partners, however numerous. Now that would impose great difficulties upon insolvents, and would be attended with great inconvenience. Construing the words of the sixth section liberally with reference to the object which the legislature may be supposed to have had in view, it seems to me that the true question is, whether the schedule contains a description of the debt sufficient to excite the attention of the creditor if he had read it. Now two objections have been taken to this schedule; first, it does not contain a true description of the amount of the debt; and, secondly, that it does not contain a true description of the names of the creditors. Now as to the amount, there is a difference of 2s. 6d. only between the debt due to the plaintiffs and that described in the schedule. That difference is so small that it could not have been intended, nor could it indeed have the effect of misleading the creditor. If the sum mentioned in the schedule varied materially from that due to the plaintiffs, that might be evidence of an intention to mislead the plaintiffs, but
that

that not being so, the debt was sufficiently described as to amount. The other objection is, that the schedule does not contain a full and true description of the persons to whom the prisoner was indebted. Now it was impossible for the defendant to name one of the plaintiffs, for he never knew or heard of him; he always dealt and corresponded with *Webb*. It is true that *Fothergill* was mentioned by *Webb* in a letter, as having a large share in the concern, and that in a conversation with the defendant, *Webb* declined taking a bill from him on the ground that if he did he would be blamed by his employers, and from that expression alone could the defendant have any reason to think that *Webb* had more than one employer. *Webb*, indeed, delivered to the defendant invoices in which he was made debtor to the *Argood* Coal Company, but that was perfectly consistent with the fact of *Webb's* being a party jointly concerned. Besides, the defendant might fairly suppose that *Webb*, who was the holder of the two promissory notes was a partner in the company. There being no evidence, therefore, to shew that the defendant had any intention to mislead his creditors; and the mode in which the debt is described in the schedule being calculated to notify to the plaintiffs that the defendant sought to be discharged in respect of their debt, I think that the provisions of the act of parliament have been complied with, and that the defendant was duly discharged as to that debt.

BAYLEY J. If the plaintiffs had looked at the schedule they must have known that the debt there mentioned as a debt due to *Webb*, was intended to describe a debt due to them, for it is stated to be a debt due for

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coals, and that *Webb* held one of the very securities upon which the plaintiffs are now suing. That being so, I think that the debt due to the plaintiffs was sufficiently described within the meaning of the sixth section of the 1 G. 4. c. 119., and consequently that the defendant was duly discharged.

Rule refused. (a)

(a) *Wood v. Jowett*. Assumpsit upon a promissory note signed by the defendant and two other persons named *Shaw* and *Linley* for 50*l.*, bearing date the 25th day of *August* 1819, and payable on demand. The defendant pleaded his discharge as an insolvent debtor under the 1 G. 4. c. 119. s. 28. The cause was tried before *Cross Serjt.* at the Spring assizes for the county of *York*, 1825; and the only question was, whether the debt in question was sufficiently described in the defendant's schedule. *James Frith*, the attesting witness to the defendant's signature of the promissory note, proved that he was secretary to a benefit society, by whom the money was lent to *Shaw*, the defendant *Jowett* and *Linley* being his sureties. The money was paid to *Shaw*, and the note was signed by the three at *Jowett's* house. The plaintiff's name was, with his sanction, used in every note given to the society. The society was held at the house of one *Edward Beat*, a victualler in *Sheffield*. There was also another victualler in *Sheffield* whose name was *Benjamin Beat*. *Frith* was not clerk to any other society held at the house of *Bent*, and *Jowett* knew that he was secretary, and this was the only debt *Jowett* owed to that society. In the defendant's schedule there was the following entry: "1820. *James Frith*, of *Sheffield*, secretary to a money society held at the house of *J. Beat* of *Sheffield*, victualler, 50*l.*" The nature of the debt was described as follows: "On a promissory note with *William Shaw* of *Sheffield*, saw maker, and *William Rose* of *Wadsley*, near *Sheffield*, cutler." Upon this evidence the learned Judge directed the jury, if they believed that the debt described in the schedule was not intended to describe the debt in question, or that it was inaccurately described with intent to deceive or mislead, or that it had, in fact, deceived or misled any of the defendant's creditors, to find their verdict for the plaintiff; but if, on the contrary, they believed the debt described in the schedule was intended for the debt in question, and that the variance was a mere mistake, without any evil intention or any injurious effect, then for the defendant. The jury found for the defendant. *Tindal*, in *Easter term*, obtained a rule nisi for a new trial, upon the ground that the debt due to the plaintiff was not duly described in the schedule, inasmuch as the debt in the schedule was described to be a debt due to *James Frith* of *Sheffield*,
secretary

secretary to a money society held at the house of *J. Beat* of *Sheffield*, victualler. Now the debt claimed in this action was due to *Wood*, and it appeared that the society, who lent the money, was held at *Edward Beat's*, and not at *J. Beat's*; and the debt was described to be due on a promissory note with *W. Shaw* and *W. Rose* of *Wadley*. Now *Rose* was not a party to the note by which the plaintiff's debt was secured. At the sittings after *Trinity* term *Brougham* was heard against the rule, and *Tindal* contra. The above case of *Forman v. Drew* was cited, and the Court held, that as the description of the debt in the schedule was not intended to mislead, nor could have the effect of misleading the creditor, it was sufficient; and it was said that the plaintiff, being informed by the plea that the defendant intended to insist upon his discharge, had it in his power to prove by *Frith*, if the fact were so, that he had been misled by the schedule.

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Rule discharged.

NICHOLSON *against* COGHILL.

Friday,
April 22d.

CASE for a malicious arrest. Plea, not guilty. At the trial before *Bayley J.*, at the last Spring assizes for *Yorkshire*, it appeared that, on the 7th of *December* 1824, *Coghill* levied a plaint against *Nicholson* in the sheriff's court at *York*, and having made an affidavit of debt for money paid to the use of *Nicholson*, caused him to be arrested. The next court was holden on the 10th of *December*, and so from week to week. On the 17th *Coghill* was ruled to declare, and he filed a declaration on the 24th. *Nicholson* having pleaded, gave a rule to reply; but *Coghill*, on the 29th of *December*, caused *Nicholson* to be discharged out of custody, and on the 31st discontinued the action and paid the costs. For the defendant it was contended, that this was not evidence of malice or the want of probable cause, and that the plaintiff must therefore be nonsuited. The learned Judge overruled the objection, and held, that under the circumstances of this case, it was for the defendant to

A. arrested *B.* on an affidavit of debt for money paid to his use, but did not declare until ruled to do so, and soon afterwards discontinued the action and paid the costs: Held, that this was sufficient *prima facie* evidence of malice and the absence of probable cause to support an action for a malicious arrest.

1825. shew that he had probable cause, but gave the defendant leave to move for a nonsuit. The plaintiff having obtained a verdict,
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Holt now moved according to the leave reserved. In actions of this description it has always been held, that the plaintiff is bound to make out the existence of malice and the want of probable cause, *Gibson v. Charters*. (a) [*Bayley J.* In that case there was originally a good cause of action, but the money was paid before the arrest actually took place.] *Sinclair v. Eldred* (b) is expressly in point. There the plaintiff had been arrested and put in bail, the defendant took no further steps, and judgment of non pros. was signed. Upon this evidence the plaintiff at the trial recovered a verdict, but a nonsuit was afterwards entered, and *Mansfield C.J.* said, that the circumstance of not proceeding in an action was not alone evidence sufficient to prove malice and support the action for a malicious arrest, for it was consistent with the case of a plaintiff losing the evidence of his claim after the commencement of the action. The same argument is applicable in the present case. This action stands on the same footing as actions for a malicious prosecution, and there the plaintiff must shew malice and the want of probable cause; and it is not sufficient to prove that the plaintiff was acquitted for want of the prosecutor's appearing when called, *Purcell v. M'Namara*. (c)

ABBOTT C. J. I am of opinion, that at the trial of this cause, evidence was given which made it the duty

(a) 2 B. & P. 129. (b) 4 Taunt. 7. (c) 9 East, 361.

of the learned Judge to leave the questions of malice and the absence of probable cause to the jury. This differs from all the cases which have been cited, for the present defendant was the actor in putting an end to the former action, he voluntarily discontinued it; and it is also material to attend to the facts and dates that appeared in evidence. On the 7th of *December* the affidavit of debt was made, and the arrest took place; *Coghill* did not declare until he was urged on by the present plaintiff, and on the 31st of the same month he discontinued the action. The very short interval between the arrest and the abandonment of the action, does not lead one to suppose, that during that time any change took place in *Coghill's* means of proving his cause of action; it must therefore be supposed, that he had no such right at first. That was a question for the jury, and considering the dates of the various steps in the transaction, and that the present plaintiff was always anxious to proceed; and that then *Coghill* voluntarily abandoned his action, I cannot say that the jury have come to a wrong conclusion.

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HOLROYD J. In order to support actions of this nature, two ingredients are necessary — malice, and the want of probable cause; and evidence must be given on the part of the plaintiff, from which they may be inferred. Here I think that there was some evidence to be left to the jury, and that in the absence of any answer to it they were justified in finding for the plaintiff. The ground of the discontinuance was peculiarly within the knowledge of the plaintiff in the former action, and he might have proved it. In actions for a malicious prosecution it has been held that evidence of the bill having

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been thrown out by the grand jury is sufficient to warrant an inference of the absence of probable cause. So in this case I think that malice and the absence of probable cause may be inferred from the discontinuance, that being the act of the present defendant, and not having been explained by him.

LITTLEDALE J. I think there was sufficient *prima facie* evidence in this case, and that the onus of proving a probable cause for the arrest was thereby cast on the defendant. In *Sinclair v. Eldred* there was judgment of non pros. The plaintiff might by a mistake suffer that to be signed even although he were desirous of continuing the suit.

BAYLEY J. I felt a great difficulty in calling upon the plaintiff to give further evidence in this case. He was arrested on an affidavit of debt for money paid to his use, and the ground of the arrest was peculiarly within the knowledge of the present defendant. In *Bull*, N. P. 14. it is said, with reference to actions for a malicious prosecution, that where the facts be in the knowledge of the defendant himself he must shew a probable cause, though the indictment be found by the grand jury, or the plaintiff shall recover without proving express malice. I think that is applicable to the present case, and that the verdict found for the plaintiff ought not to be disturbed.

Rule refused.

1825.

EWER *against* AMBROSE and J. BAKER.Wednesday,
April 27th.

ASSUMPSIT. Plea in abatement by *Ambrose*, that *S. Baker* should have been joined. *J. Baker* suffered judgment by default. At the trial before *Gaselee J.*, at the *Suffolk Spring assizes 1820*, the plaintiff called *Samuel Baker* as a witness, who deposed that he never was in partnership with the defendant. *Ambrose* produced an examined copy of an answer in chancery sworn to by the witness. It was objected that the original should have been produced. The learned Judge overruled the objection, and the defendant obtained a verdict, and now

Where a witness in a trial at law gave evidence at variance with what he had previously sworn in an answer in Chancery: Held, that an examined copy of that answer was admissible to contradict him, and that it was not necessary to produce the original answer.

Frere Serjt. moved for a rule nisi for a new trial, on the ground that the examined copy of the answer was improperly received in evidence; and he contended that as the answer was produced to contradict the witness, and therefore to shew that he had been guilty of perjury, it was to be considered as in the nature of a criminal proceeding, and if so the original answer should have been produced, *Rex v. Morris (a)*, *Lady Dartmouth v. Roberts (b)*, *Rex v. Benson. (c)*

Per Curiam. The evidence admitted in this case might indeed be prejudicial to the character of the witness, but the attempt to contradict him cannot be considered as in the nature of a criminal proceeding,

(a) 2 Burr. 1189. (b) 16 East, 334. (c) 2 Camp. 508.

although

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although the evidence then given might be the ground for subsequent criminal proceedings. The examined copy of the answer was therefore properly admitted.

Rule refused on that point, but granted on the ground that the verdict was against evidence.

Saturday,
April 22d.

CROZER *against* PILLING and MOORE.

A plaintiff is bound to accept from a defendant in custody under a ca. sa. the debt and costs, when tendered in satisfaction of his debt, and to sign an authority to the sheriff to discharge the defendant out of custody. And an action on the case will lie against a plaintiff for having maliciously refused so to do; and the refusal to sign the discharge is sufficient *prima facie* of malice in the absence of circumstances to rebut the presumption.

DECLARATION stated, that, in *Michaelmas* term 3 G. 4., *Pilling* had recovered a judgment for 54*l.* 19*s.*, and for the obtaining satisfaction of a certain residue of the damages (part having before been satisfied) sued out a ca. sa., indorsed, to levy 32*l.*, besides poundage; that the ca. sa. was delivered to the sheriff so indorsed to be executed; that the sheriff afterwards arrested the plaintiff, and detained and had him in custody under the writ, and the plaintiff being in custody as aforesaid, afterwards, to wit, on, &c., at, &c., tendered and offered to pay to the defendant *Pilling*, by the hands of the defendant *Moore*, as his attorney, a large sum, to wit, the sum of 34*l.* 13*s.*, in full satisfaction and discharge of the damages, costs, and charges so adjudged to the defendant *Pilling*, being the sum indorsed on the writ, together with poundage and lawful expences, and being the whole amount lawfully due or demandable of and from the plaintiff to the defendant *Pilling* under the writ, and demanded of the defendant *Moore*, as such attorney, to receive the same, in full discharge and satisfaction of the said damages, costs, and charges, and sheriff's poundage, and to instruct and inform the said sheriff that the same were satisfied, and to give the said sheriff authority to discharge the plaintiff from his custody under the writ;

yet

yet defendant, *Moore*, wilfully and maliciously intending to oppress, harass, and injure the plaintiff, and to cause him to be longer imprisoned and detained by the sheriff under the writ, without any reasonable cause whatever, wilfully and maliciously refused to accept the money tendered, in discharge of the damages, costs, &c. &c., and did not nor would instruct the sheriff that defendant, *Pilling*, was satisfied of his damages, &c., nor give authority to the sheriff to release the plaintiff out of his custody, under the writ aforesaid, whereby and by reason of the conduct of the defendants in that behalf the plaintiff was detained in custody under the writ for a long space of time, to wit, &c. There were other counts stating the tender to have been made to *Pilling* by the hands of *Moore*, and a refusal by both the defendants to accept the money, or to instruct the sheriff to discharge *Crozer*. Plea, not guilty. At the trial before *Bayley J.*, at the Spring assizes for the county of *York*, 1825, the plaintiff proved the issuing of the ca. sa., &c., on the 28th of *November* 1822, and the arrest of the plaintiff *Crozer*. Soon after *Crozer* had been arrested under the ca. sa., he gave notice of his intention to take the benefit of the insolvent act, and he was opposed by defendant, *Pilling*, on the ground that he had not inserted in his schedule certain property, and he was remanded for that cause by the court. In *February* 1824 the debt and costs, amounting to 34*l.* 13*s.*, were tendered to the defendant, *Moore*, as the attorney of *Pilling*, and he at the same time was requested to give an order to the sheriff to discharge *Crozer* out of custody. The defendant, *Moore*, refused to give the order for the discharge, upon the ground that *Crozer* was indebted to *Pilling* on account of costs incurred in opposing his discharge under the insolvent debtors' act.

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An application was afterwards made to *Pilling*, and he stated that he should leave the matter entirely to the defendant, *Moore*. It was objected on the part of the defendant, that the action was not maintainable, on three grounds; first, because a plaintiff was not bound by law to discharge a defendant taken in execution upon a tender of the debt and costs, but that it could only be lawfully done by an order of the court out of which the writ issued; and, therefore, that if the defendants had given authority to the sheriff to discharge *Crozer*, the sheriff would not have been justified in discharging him; secondly, that the tender ought to have been made to the defendant, *Pilling*, and not to his attorney, *Moore*; and, thirdly, that there was no evidence of malice, inasmuch as the costs of opposing the insolvent was a debt bonâ fide due to *Pilling*. As to the first point, the learned Judge was of opinion, that the plaintiff was bound to accept the debt and costs, tendered in satisfaction of his debt, and to give authority to the sheriff to discharge the defendant. As to the second point, he was of opinion that the attorney upon the record was the person to whom payment ought to have been made. As to the third point, the learned Judge told the jury, that there being no foundation for the refusal of the discharge, that refusal was wrongful, and that it was for them to consider whether it was not maliciously done. The jury found a verdict for the plaintiff, with 50*l.* damages.

F. Pollock now moved for a new trial. First, he contended, that the debt and costs ought to have been paid or tendered to the plaintiff, and not to his attorney upon the record. [Upon this point the Court intimated a clear opinion that the attorney upon the record was the

the proper person to receive payment of the debt and costs, and that the tender was properly made to him.] Secondly, the action is not maintainable, because a plaintiff is not bound by law, after a defendant is in custody under a ca. sa., to give an authority to the officer of the law to discharge the defendant out of custody, upon a tender of the debt and costs. The defendant is in custody by virtue of a writ founded on a judgment of a court of law, and the sheriff is entitled to have the authority of the court out of which the writ issues for the discharge of the prisoner. In *Taylor v. Baker* (a) two judges were of opinion that payment to the marshal was no discharge, as against the plaintiff at whose suit the party was in execution; but *Wilde J.* was of a different opinion. [*Bayley J.* In 2 *Levinz*, 203., the court is said to have decided, that the plea of payment to the marshal was bad, because the marshal was not to receive the debt, but only to detain the defendant in custody until he paid it to the plaintiff. So that it seems to have been considered in that case, that the marshal or sheriff has authority only to detain the defendant in custody until the debt be paid to the plaintiff; and if payment can be made to the plaintiff alone, it must follow that it is his duty to accept the debt and costs when they are tendered.] It was certainly held, in *Slackford v. Austen* (b), that payment of the debt and costs to the sheriff was no discharge, as against the plaintiff; but a defendant taken in execution can only be discharged out of custody by authority of the court out of which the process issues; for it was the duty of the defendant to have paid the debt and costs before

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(a) 2 *Lev.* 203. 5 *Kemble*, 748. 768.(b) 14 *East*, 468.

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the writ issued. In *Burmester v. Hilch* (a) the court refused to permit the defendant to pay into court the debt and costs, up to a certain day after the action brought (thereby excluding the costs of the declaration delivered) upon the ground of an offer to pay the debt and costs up to that period, without having made a tender before action, or obtaining the common rule for staying proceedings, on payment of debt and costs, up to the time of the application. In *Scheibel v. Fairburn* (b) it was held, that an action on the case would not lie against a party suing out a writ of *capias ad respondendum*, if he neglect to countermand it after payment of the debt at least, unless malice be averred. In *Com. Dig. tit. Execution, C. 13.*, it is said "a man in execution shall not be discharged upon affidavit though there be cause, but ought to have a supersedeas or other matter of record;" and there is no precedent of any such declaration, nor any intimation of any such action having ever been brought with success, nor any authority in any book of practice or of general law laying it down as the duty of a plaintiff to assist in the discharge of a defendant by any act whatever. In an unreported case of *Locker v. Morrison*, tried in *London* before Lord *Ellenborough*, which was an action against a party for refusing to accept the debt and costs, and to give a discharge to the marshal, that learned Judge held that the action would not lie, and nonsuited the plaintiff. [Bayley J. How is the defendant in execution to get out of custody?] "There must be some legal mode, independent of any act of the plaintiff, as in the event of his refusal to authorize the discharge, the party in

(a) 13 *East*, 551.(b) 1 *Bos. & Pul.* 388.

custody,

custody, supposing the action to lie, might get damages for his detention, but not his liberty, which he was legally entitled to.

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ABBOTT C. J. I think there ought not to be any rule in this case. The general question is, whether in a case where the defendant has been taken in execution under a *ca. sa.*, and the whole sum due to the plaintiff has been tendered to him or his attorney, he the plaintiff is bound to receive the money and to sign an authority to the sheriff to discharge the prisoner. Supposing that point to be in favour of the plaintiff, then a question peculiar to this case arises, whether the refusal to discharge was unlawful and malicious. In considering the general question it is important to have regard to the power of taking and detaining a party in execution. It has been decided, in *Clachford v. Austin*, that a sheriff is not bound to receive the money, and that if he does receive it, the payment to him is no discharge of the debt as against the plaintiff. I believe the uniform practice since that decision has been for the sheriff not to receive the debt and costs. It being established that the sheriff has no authority to receive the money and give the prisoner his discharge, the question now arises, whether the plaintiff in the case is bound to accept the debt and costs when tendered to him, and to give authority to the officer of the law to discharge him out of custody. If we were to decide that a plaintiff is not bound to accept the debt and costs, the consequence may be, that a party taken in execution at the end of *Trinity* term, may remain in prison until *Michaelmas* term, unless one of the Judges of the court in which the action is brought happens

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happens to be in town. According to the habits prevailing a century ago, a Judge was rarely in town during the vacation. But on full and mature consideration I am of opinion, that when a debtor offers to a creditor all the money due to him, it is the duty of the creditor in point of law to accept the same in satisfaction of his debt, and to give an authority to the officer in whose custody the debtor is, to allow the debtor to go at large. Then the other question is, whether the refusal to give an authority to the sheriff to discharge the prisoner upon a tender of the debt and costs, was malicious. I think that a party is not to be deprived of his liberty in respect of any other demands than those in respect of which he is detained in the action. The act of the defendants, therefore, in detaining the plaintiff in custody after he had tendered the debt, was wrongful, and must be presumed to have been malicious, in the absence of any circumstance to rebut the presumption of malice.

HOLROYD J. When I consider the object and form of the writ of ca. sa. and the nature of the authority of the sheriff as to the debt and costs, I think that there cannot be any doubt that a creditor is bound to accept the money due to him on tender made, and to give an authority to the sheriff to discharge the defendant out of custody. By the writ the sheriff is commanded to take the defendant and safely keep him, so that he may have his body in court *to satisfy the plaintiff the debt and costs*. The object of the writ is, that the debtor should continue in custody only until the plaintiff is satisfied his debt. That object was answered as soon as the debt and costs were tendered, and the object of
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the writ being attained; the defendant ought not to have been continued in custody after he was ready and willing, and offered to pay the debt in the mode required by law. The party who caused him to be detained in custody after he had so tendered the money, was guilty of an unlawful act. Now the plaintiff in the cause was the party who caused the defendant to be detained in custody, after he ought to have been set at large, for it was decided in *Taylor v. Baker* (a), and *Slackford v. Austen* (b), that payment of the debt and costs to the marshal or the sheriff will not operate as a satisfaction to the plaintiff of his debt. If the sheriff, therefore, without the authority of the plaintiff in the cause, had discharged the defendant out of custody, he would not have been justified, for he is not to take the word of the defendant that he has satisfied the debt, or that he has made a tender of it in the mode required by law; and if trusting to his word, the sheriff had discharged him out of custody, and it afterwards turned out that the tender had not been duly made, he would have been liable to an action for an escape, at the suit of the plaintiff. The sheriff, therefore, for his own security, before he discharges a prisoner, is entitled to know from the plaintiff that the debt has been satisfied, or that the defendant has done all that the law requires of him in order to satisfy the debt. But the plaintiff's right to keep the defendant in custody was at an end as soon as the debt and costs had been duly tendered to him. The defendant's detention in custody then became unlawful, and the sheriff not being bound to discharge

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(a) 2 *Lev.* 203.(b) 14 *East*, 468.

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the defendant without an authority from the plaintiff, it follows that it was the duty of the latter to give such authority. I think, therefore, that this action is maintainable, and that the verdict was properly found for the plaintiff.

LITLEDALE J. I think that the plaintiff was bound to accept the debt and costs tendered in satisfaction of his debt; and the refusal to sign the discharge must be considered to have been maliciously done, there being no circumstances in the case to rebut the presumption of malice.

BAYLEY J. I thought at the time of the trial, that a plaintiff having taken a defendant in execution, had no right to force him to incur expence and delay in order to obtain his discharge, after the debt and costs had been tendered. It appears from *Taylor v. Baker*, that the marshal, upon payment of the debt and costs to him, has no authority to discharge the prisoner, and in *Stamford v. Davies (a)*, it was held, that the payment of the debt and costs to the sheriff was not a discharge as against the plaintiff. In *Norton's case (b)*, it is laid down by the court, that a defendant is not bound to pay money to the sheriff, but to the party; and it was said that it was sufficient if the money was paid to the plaintiff's attorney upon the record, for that would have been a payment to the plaintiff himself.

Rule refused.

(a) 2 Freem. 482.

(b) 2 Show. 139.

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The KING *against* AMPHLIT.

THIS was an indictment against the proprietor of a newspaper for a libel. At the trial before *Garrow* Baron, at the last assizes for the county of *Stafford*, the only proof of publication was the delivery of a copy of the newspaper containing the libel to the officer at the stamp office. It was objected that this was no evidence of an unlawful publication. The learned Judge overruled the objection, and the defendant was found guilty; and now *Campbell* moved for a new trial.

The delivery of a newspaper to the officer at the stamp office is a sufficient publication to sustain an indictment for a libel in that paper.

But the Court were clearly of opinion, that this was sufficient evidence of a publication in order to support an indictment, inasmuch as the officer of the stamp office would at all events have an opportunity of reading the libel himself.

Rule refused.

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Friday,
April 19th.

COOPER against WALKER.

By an inclosure act, the commissioners were to allot unto the rector of the parish of *Waddingham* such parcel of the arable lands and common pastures within the township of *Snitterby* and also of the titheable parts of township of *Waddingham* as should (quantity, quality, and situation considered), be equal in value to two-fifteenth parts of the titheable places of the last men-

tioned lands and grounds, in lieu of tithes belonging to the rector, and arising within the same lands and grounds; and immediately after the enrollment of the award, all tithes arising within the lands or grounds directed to be inclosed were to be extinguished. By another clause, there was saved to all and every person, bodies politic and corporate, their heirs, successors, and administrators (other than and except the respective persons to whom any allotment should be made, by virtue of the act in respect of the interest or property for which such allotment or compensation should be made), all such estate and interest as they had and enjoyed in respect of the said fields, common, pastures, and waste grounds before the passing of the act, but that no other person should have power to disturb any of the allotments to be made in pursuance of the act, but should accept their respective allotments which should be made in lieu of the lands, tithes, common rights, and interests which they would have been entitled to in case the act had not passed. The commissioners, by their award under the head "*Waddingham* allotments," allotted to the rector land in lieu of his glebe lands in *Waddingham*; and then under the head "*Snitterby* allotments," there was an allotment to the rector of land in lieu of glebe, and they then allotted to him 223 acres, which they adjudged to be in lieu of and as a full compensation for the tithes belonging to the rector within the open fields, common pastures, and lands in the townships of *Snitterby* and *Atterby*; and they further assigned to the rector other lands in lieu of the tithes of the ancient inclosed lands in *Snitterby*.

The lands allotted to the rector in lieu of tithes was more than two-fifteenths of the lands inclosed in *Snitterby* and *Atterby*, but less than two-fifteenths of the lands inclosed in *Snitterby*, *Atterby*, and *Waddingham*, but there was not any allotment expressed to be in lieu of the tithes of *W.*: Held, that under this award, the commissioners had not made any allotment to the rector in lieu of the tithes of *Waddingham*, and that being so, the rector's right to the tithes in kind was reserved to him by the saving clause in the act.

and

THIS was an action brought on the 2 & 3 Ed. 6. under an order of the Lord Chancellor, by the Reverend *William Cooper*, as rector of the parish of *Waddingham*, in the county of *Lincoln*, against *Wm. Walker*, being an occupier of certain arable, meadow, and pasture lands situate within the parish of *Waddingham*, for not setting out the tithe thereon. On the trial of this case, the following facts were proved or admitted. The plaintiff now is, and since the 29th of *September* 1811, has been rector of the parish and parish church of *Waddingham*. The defendant, on the 29th of *September* 1811, occupied certain arable, meadow, and pasture lands in the township of *Waddingham*, and has cut, reaped, and carried away divers crops of corn, grain,

and hay grown on such lands, of the value of 20*l.*, without having at any time divided or set forth for the plaintiff any tithes, and without having at any time compounded or otherwise agreed with the plaintiff for or concerning any tithes in respect of the said crops or any part thereof. The parish of *Waddingham* consists of two townships, viz. *Waddingham* and *Snitterby*. Certain proceedings in Chancery in the year 1700 were given in evidence, consisting of a bill, answer, and decree. The bill set out an agreement made between the then rector of *Waddingham* and the owners of certain lands in the parish; that those lands should be inclosed, and that the rector should have a certain portion of the lands, and the annual sum of 94*l.* in lieu of tithes; and this agreement was confirmed, and ordered to be performed by the decree. The lands on which tithes are claimed by the plaintiff in this action form no part of the lands inclosed under the above mentioned decree, but were part of the lands inclosed under the act of parliament in 1769, after mentioned. The above mentioned composition was proved to have been paid from time to time by the occupiers of land in the township of *Waddingham*, and accepted by the rector from that time until the year 1788, when a new rector, Dr. *J. Barker*, the immediate successor of *Robert Carter* hereinafter mentioned, succeeded; the composition of 94*l.* per annum was then abandoned, and a new composition agreed upon between the said occupiers and the then rector, at a valuation of the whole parish; and such valuation had respect as well to the lands inclosed under the act of parliament hereinafter mentioned as those inclosed under the decree. The plaintiff was presented to the rectory of *Waddingham*

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in 1808, and the defendant paid his share of the composition in respect of the lands in question to the plaintiff's predecessor, and to the plaintiff, until the year 1811. From *Michaelmas* 1811, to *Michaelmas* 1812, the plaintiff took the tithes in kind, and from *Michaelmas* 1812 the defendant refused to pay any composition, or set out his tithes in respect of the lands in question.

In the year 1769, an act of parliament, entitled "an act for dividing and inclosing certain open fields, lands, and grounds in the several townships of *Atterby*, *Snitterby*, and *Waddingham*, in the county of *Lincoln*," was passed. That act recited (inter alia) that the Reverend *Robert Carter*, clerk, was at that time rector of the parish and parish church of *Waddingham cum Snitterby*, and as such was seised of certain glebe lands in the said open fields and grounds, and entitled to all the tithes, great and small, ecclesiastical dues, duties, and payments arising within the titheable places of the said parish; and also to the tithes arising upon certain parcels of land lying dispersed in the open fields of *Atterby*; and then enacted that all the said open arable fields, commons, pastures, carrs, and waste grounds, or other open and common grounds in the said several townships, be divided and allotted by certain commissioners appointed to carry the act into execution, and directed such commissioners to assign and allot unto and for the said *Robert Carter* and his successors, rectors of the said parish of *Waddingham cum Snitterby* aforesaid, such parcel or parcels of the said arable fields, common pastures, and carrs within the said township of *Snitterby* (except the common pasture called the *Carrside*), so directed to be inclosed as aforesaid, as should in the judgment of the commissioners, or any two of them, be
equal

equal in value to and a full satisfaction for the present glebe lands of the said rector within the last mentioned lands and grounds so to be inclosed, and then to assign and allot unto and for the said *Robert Carter* and his successors, rectors as aforesaid, such parcel or parcels of the residue of the same arable fields and common pastures and carrs in *Snitterby* aforesaid, and also of the titheable parts of the said township of *Waddingham*, as shall (quantity, quality, and situation considered), contain or be equal in value to two full fifteenth parts of the titheable places of the last mentioned lands and grounds, in lieu of and as a full recompence and compensation for all the tithes, dues, duties, and payments whatsoever belonging to the said rector, and arising, renewing, or happening, or which might arise, renew, or happen within the same lands and grounds; and further, to assign and allot unto and for the said *Robert Carter* and his successors (rectors as aforesaid), such parcel or parcels of the said arable fields of *Snitterby* aforesaid as by the said commissioners, or any two of them, should (quantity, quality, and situation considered) be adjudged to be equal in value to the tithes of the ancient enclosed lands in *Snitterby* aforesaid. The act further directed allotments to be made in the *Carrside* pasture, equal in value to two-fifteenth parts of the titheable grounds (quantity, quality, and situation considered), to the rector of *Waddingham cum Snitterby*, and the vicar of *Bishop Horton*, according to their respective shares and interests in the tithes of the said *Carrside* pasture. By the act it was further enacted, that within six calendar months next after the commissioners, or any two of them, should have completed the division and allotments thereby directed to be made, or as soon after as con-

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veniently might be, they should form and draw up their award or instrument in writing, which should express distinctly and separately the quantity in statute measure of the acres, roods, and perches contained in the said fields and grounds thereby directed to be so set out and assigned, and also the situation, abuttals, and boundaries of the several parcels and allotments respectively by them set out and assigned; and also the situation, abuttals, and boundaries of each and every the respective townships of *Atterby*, *Snitterby*, and *Waddingham*, and should contain orders and directions as to the repair of the fences, ditches, gaps, stiles, and bridges; and also all such other orders, regulations, and determinations as were in and by the act directed or authorized to be made; and all such other orders, regulations, and determinations as should be necessary or proper to be inserted in the said award conformable to the tenor and purport of the said act; or for the completing and maintaining the said division and inclosure. And that the said award should within six calendar months after the execution thereof, be enrolled by the clerk of the peace of the division of *Linsey*, in the county of *Lincoln*. And that the several allotments and divisions, and all orders, directions, regulations, and determinations so to be made as aforesaid, and declared in and by the said award, should be binding and conclusive unto and upon all the parties interested; and that immediately after the enrolment of the said award, all manner of tithes, ecclesiastical dues, duties, and payments, of what nature or kind soever, arising, renewing, increasing, payable, or happening within or out of the lands or grounds thereby directed to be inclosed, or within the said ancient inclosed lands or grounds, or otherwise howsoever

soever (except such surplice fees and other payments as are before excepted), and all right of common, right of stray, and right of average upon the said lands and grounds thereby directed to be inclosed, and every of them, should cease and for ever be extinguished. By the act, an appeal to the quarter sessions of the peace was given to any person who might think himself aggrieved by any thing done in pursuance of the act, the appeal to be within six calendar months after the cause of complaint, other than and except such orders and determinations of the commissioners as in the act were declared to be final and conclusive. And the justices were required to hear and determine the matter of such appeal, which determination of the said justices should be final and conclusive to all parties concerned; and should not be removed by certiorari or any other process whatsoever into any of the courts of *Westminster*. The act contained the following saving clause: "Saving always to the king's most excellent majesty, his heirs and successors, and to all and every person and persons, bodies politic or corporate, his, her, or their heirs, successors, executors, and administrators, other than and except the respective persons to whom any allotment of land or compensation shall be made by virtue of this act in respect of the interest or property for which such allotment or compensation shall be made, all such estate and interest as they, every, or any of them had and enjoyed of, in, to, or in respect of the said fields, common pastures, carrs, and waste grounds, or any of them, before the passing of this act, or could or might have had or enjoyed in case the same had not been made; but no such other person or persons, bodies politic or corporate, his, her, or their heirs, executors,

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executors, administrators, or successors shall have power to disturb any of the allotments to be made in pursuance of the act, but shall accept their respective allotments which shall be made in lieu of the lands, common rights, tithes, or other interests which he, she, or they would have been entitled to in case this act had not been made." The commissioners appointed by the act duly proceeded to make a division and allotment of the several lands and grounds thereby directed to be divided and inclosed; and on the 29th of *November* 1770, duly made and executed their award in writing concerning the same, which said award was duly enrolled according to the provisions of the act. By this award the commissioners assigned unto *Robert Carter* and his successors for the time being, rectors of *Waddingham cum Snitterby*, as follows: Three several plots or parcels of ground, containing together fifty-one acres, one rood, and thirty perches statute measure, which they declared to be in lieu of and as a compensation for all the said *Robert Carter's* ancient glebe lands and rights of common in the said *North Carr, South Carr*, and *Carr Side* pasture, and the ace field in *Waddingham* aforesaid. These allotments are figured in the margin of the award, under the head of "*Waddingham* allotments." "*Glebe* allotment." At the conclusion of the *Waddingham* allotments, on the sixteenth sheet of the award, there is a marginal note by the commissioners, viz. "Here end the *Waddingham* allotments." And immediately after is the following marginal note; viz. "*Snitterby* allotments begin here." In the sixteenth sheet of the award in the margin, under the head "*Snitterby* allotments, Allotment to the rector in lieu of glebe," the commissioners assigned to the said

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Robert Carter, as rector of *Waddingham cum Snitterby*, two several plots or parcels of ground, containing together 33 acres, 3 roods, 32 perches; and which they declared to be in lieu of the glebe lands, and right of common belonging to the said *Robert Carter*, as rector aforesaid; and also in lieu of an ancient inclosure or piece of glebe land given by him in exchange to *John Richardson*. The commissioners then assigned to the said *Robert Carter*, as rector of *Waddingham cum Snitterby*, five several plots or parcels of ground, containing together 223 acres, 1 rood, 31 perches, statute measure, which 223 acres, 1 rood, 31 perches (quantity, quality, and situation considered) they adjudged to be in lieu of and as a full recompence and compensation for all the tithes, dues, duties, and payments belonging to the said *Robert Carter*, as rector aforesaid, within the open fields, common pasture, and carrs in the townships of *Snitterby* and *Atterby* aforesaid. The commissioners also assigned unto the said *Robert Carter* and his successors, rectors of *Waddingham cum Snitterby*, one plot or parcel of ground, containing 17 acres, 2 roods, statute measure, which (quantity, quality, and situation considered) they adjudged to be equal in value to the tithes of the ancient inclosed lands in *Snitterby*. At the end of the *Snitterby* allotments is a marginal note by the commissioners as follows; viz. "Here end *Snitterby* allotments." The commissioners then assigned unto the Rev. *George Jolland* and his successors, for the time being, rectors of *Atterby* aforesaid, a certain allotment in lieu of glebe, certain allotments, amounting together to 125 acres, 3 roods, 26 perches, statute measure, which (quantity, quality, and situation considered) contained or were equal

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equal in value to two full fifteenth parts of the arable fields, common pastures, and carrs in *Atterby* aforesaid; and they adjudged the same to be in lieu of and as a compensation for all the tithes, dues, duties, and payments of the said *G. Jolland* within the said arable fields, common pastures, and carr grounds in the said several townships of *Atterby* and *Snitterby*, except as in the said act is excepted; and also certain allotments in lieu of tithe of old inclosure in *Atterby* and *Snitterby* aforesaid.

The lands allotted in *Snitterby* under this act amount to 1533 acres, 17 perches; and, deducting the allotment for the glebe, 33 acres, 3 roods, 32 perches, there remain 1499 acres, 25 perches, two-fifteenths of which would be 199 acres, 3 roods, 32 perches.

The lands allotted as aforesaid to the rector in *Snitterby* amount to 223 acres, 1 rood, 31 perches, leaving an excess of 23 acres, 2 roods, 9 perches, above the 199 acres, 3 roods, 32 perches.

The lands allotted in the township of *Waddingham* under the act amount to 1281 acres, 1 rood, 36 perches; and, deducting the allotment for glebe and rector's right of common, 51 acres, 1 rood, 30 perches, and for a gravel-pit, 1 acre, 2 roods, there remains of lands in that township, 1228 acres, 2 roods, 6 perches, two-fifteenths of which would be 163 acres, 3 roods, 8 perches.

The lands allotted in the township of *Atterby* under the act amount to 846 acres, 3 roods, 28 perches, and deducting the allotment for glebe, 13 acres, there remains of lands in that township 833 acres, 3 roods, 28 perches, two-fifteenths of which would be 111 acres, 29 perches. The lands allotted to the rector amount to 125 acres,
3 roods,

3 roods, 26 perches, leaving an excess of 14 acres, 2 roods, 37 perches beyond the 111 acres, 29 perches.

There are 888 acres, 16 perches allotted to proprietors of land in *Waddingham* having no allotments made to them in *Snitterby*.

There is not in the award any order, direction, regulation, or determination of the commissioners as to the tithes of the lands in the township of *Waddingham*, inclosed by virtue of the act, or any part thereof, unless any thing above stated amounts thereto.

One of the plaintiff's witnesses in his cross-examination, stated that the land which the rector of *Waddingham cum Snitterby* had was of good fair quality, and lay together convenient. He got 40 acres of can land much better than the uninclosed land which had not been mowed for seven years. The defendant did not enter into any evidence at the trial, and the jury found a verdict for the defendant. If the Court should be of opinion that the verdict was wrong, then a new trial is to be awarded, otherwise the verdict is to stand.

This case was argued by *Adams* Serjt. for the plaintiff, and *S. M. Phillips* for the defendant. For the former it was contended, that the commissioners were bound by the local act to allot to the rector of *Waddingham* lands in *Waddingham*, in lieu of his tithes in *Waddingham*, for the act directed them to allot to the rector such parcel or parcels of the arable fields, common pastures, and cans within the township of *Snitterby*, and also of the titheable parts of the township of *Waddingham* so directed to be inclosed, as should (quantity, quality, and situation considered) be equal in value to two full fifteenth parts
of

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of the titheable places of the last-mentioned lands and grounds, in lieu of and as a full compensation for all the tithes belonging to the rector, and arising within the same lands and grounds. The commissioners were, therefore, to make to the rector such an allotment of the lands in *Snitterby*, and of the titheable parts in the township of *Waddingham*, as should be equal to two-fifteenth parts of the titheable parts in *Snitterby*, and to two-fifteenth parts of the titheable parts in the township of *Waddingham*. Now the commissioners, by the award, have not made any allotment to the rector in lieu of his tithes in the township of *Waddingham*. The allotment of land, there in lieu of tithes in *Snitterby* and *Atterby*, cannot be intended to include a compensation for the tithes in *Waddingham*, for the commissioners had no power under the act of parliament to allot land in *Snitterby* or *Atterby*, as a compensation for the tithes in *Waddingham*. There are 800 acres allotted to persons in *Waddingham*, who have no allotments in *Snitterby*, and it is to be contended that they are to pay no tithes to the rector, although he has received no allotment in respect of their lands. If the allotment in *Snitterby* was to be a compensation for all the tithes, it should have consisted of 364 acres, whereas it consists only of 223 acres; and it was proved at the trial that the quality was not superior. Thirdly, assuming that the rector has no allotment in lieu of his tithes in *Waddingham*, his right is not barred by the act of parliament. It is true, that in *Cooper v. Thorpe* (a) the Master of the Rolls was of opinion that the rector was barred; but it appears, from

(a) 1 Swanst. 92.

the report of that case, that the saving clause in the act of parliament was not adverted to. By that clause the rights of all persons are saved, "other than and except the respective persons to whom any allotment of land or compensation shall be made, by virtue of that act, in respect of the interest or property for which such allotments or compensations should be made." Now, by the award the rector has not had any allotment or compensation in respect of his estate and interest in the tithes of *Waddingham*. His right, therefore, is saved, and consequently the act of parliament is no bar to this action.

For the defendant it was admitted, that the legislature intended that the rector should have an allotment in lieu of his tithes in *Waddingham*, but it was contended, that it must be taken upon the award that the rector had received such an allotment, although the commissioners had not in express terms allotted lands in *Waddingham* in lieu of the tithes there. By the act they were empowered to allot such parcels of the arable fields and common pastures of the township of *Snitterby*, and of the township of *Waddingham*, as should (quantity, quality, and situation considered) be equal to two-fifteenth parts of the titheable parts of those lands. Now there may have been an agreement between the land owners and occupiers of *Snitterby* and the land owners and occupiers of *Waddingham*, that the rector of *Waddingham* should receive, in lieu of his tithes in *Waddingham*, a larger proportion of lands in *Snitterby*, than he otherwise would have been entitled to; and if that might be legally done it may be fairly presumed that it was done; for otherwise it is difficult to account for the quantity of land allotted to the rector in *Snitterby*, and the rector
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having acquiesced in the award for such a length of time, every intendment ought to be made in favor of it. And if he has had any allotment in lieu of the tithes in *Waddingham*, he comes within the exception in the saving clause, and is barred.

ABBOTT C. J. I am of opinion, that in this case there ought to be a new trial. The case may be considered as comprehending three points. First, whether the commissioners were required by the act of parliament to make an allotment to the rector in respect of tithes in *Waddingham*. That is a question of law. Secondly, whether they have done so, that is a question of fact: and, thirdly, supposing the commissioners have not made an allotment in lieu of tithes, whether the rector is barred from now claiming the tithes in kind.

As to the first point it is clear, and indeed it is not disputed, that the commissioners were required to make an allotment to the rector for his tithes in *Waddingham*. Then have they done so? By the award they allot to the rector 51 acres, 1 rood, 30 perches, as a compensation for his ancient glebe lands and rights of common in what is called *carr* land in *Waddingham*; then under the head "*Snitterby* allotments," they give 33 acres, 3 roods, 32 perches, which they declare to be in lieu of the glebe lands and right of common belonging to the rector, and also in lieu of an ancient inclosure and piece of glebe land given by him in exchange. They then allot to him five several parcels of ground, containing 223 acres, 1 rood, 31 perches, in lieu of and as a full recompence and compensation for all tithes belonging to him in the townships of *Snitterby* and *Atterby*; and they then

then allot 17 acres, 2 roods, which they adjudge to be equal in value to the tithes of the ancient inclosed lands in *Snitterby*; they then further allot to the rector of *Atterby* 125 acres, 3 roods, 26 perches, in compensation for the tithes of the arable fields, common pastures, and can grounds in the several parishes of *Atterby* and *Snitterby*. There is nothing, therefore, in the award to shew that the commissioners allotted any thing to the rector of *Waddingham cum Snitterby*, in lieu of his tithes in *Waddingham*. Then, according to the rule of construction, *expressio unius est exclusio alterius*, we must say, that upon this award they have not done so. I do not enter into the question of numerical calculation, because we cannot thence draw any conclusion that the commissioners intended to include in their award a compensation for the tithes in *Waddingham*. It may, perhaps, be asked, how could the commissioners omit to award to the rector a compensation in lieu of his tithes in *Waddingham*? In reading the case, it is perfectly clear how that happened. It appears that, before the passing of the act of parliament, the rector had agreed to accept in lieu of tithes a composition of 94*l.* per annum from the occupiers of other land in the township of *Waddingham*. Now, the commissioners probably thought that was an agreement binding the rector to accept from the parishioners that sum in lieu of all his tithes in *Waddingham*, and that they should, by allotting land to him in lieu of tithes, pay him twice over. The old composition was paid during the time of the first rector. Upon his death, in 1788, there was a different composition paid to his successor, in respect both of the lands inclosed under the decree, and of the lands inclosed under the act of parliament. It appears,

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therefore, that the parishioners then thought that the tithes of *Waddingham* were not included in the award. Some of them went on for a few years and paid that composition to the present rector. Now, this explanation fortifies the conclusion, that it was not intended to include in the award any compensation for the tithes in *Waddingham*. Then the third question is, whether the rector is barred. I should be sorry to find that he was, for in that case the act of parliament would work great injustice, for the rector would be deprived of his rights without receiving any compensation. By the saving clause, which was not adverted to when the case was before the Master of the Rolls, there is saved to all persons, bodies politic or corporate, their heirs and successors (other than except the persons to whom any compensation shall be made by virtue of the act, in respect of the interest or property for which such allotments or compensations should be made), all such estate and interest as they, or any of them had and enjoyed, of, into, or in respect of the said fields, common pastures, carrs, and waste grounds, or any of them before the passing of the act. The rector, therefore, not being a person to whom any allotment was made in respect of the interest or property in the tithes of *Waddingham*, is not barred by the statute. That being so, I am of opinion that there ought to be a new trial.

BAYLEY and HOLROYD Js. concurred.

Rule absolute for a new trial.

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NUTTALL *against* STAUNTON.Friday,
April 19th.

REPLEVIN for goods taken in certain premises at *Staunton Grange, December 30th, 1823.* Avowry, that one *J. S.*, for one year and a half next before and ending on the 29th of *September 1823*, held and enjoyed a certain farm, of which the premises mentioned in the declaration were part and parcel, as tenant to defendant, at the yearly rent of 500*l.*, payable on the 29th of *September* and 25th of *March*, by equal portions; and *J. S.* continued and was in possession of the said premises in which, &c., from the said 29th of *September 1823*, until and at the time when, &c.; and because 150*l.*, parcel of the sum of 250*l.* of the rent aforesaid, for half a year, ending on the 29th of *September 1823*, was due and in arrear from *J. S.* to defendant, (the residue thereof having been paid,) and continued unpaid at the said time when, &c., defendant avowed taking the said goods in the said premises, in which, &c., at the said time when, &c., that being within the space of six calendar months next after the 29th of *September 1823*, and during the continuance of the title and interest of defendant in the said premises in which, &c. Second avowry, that *J. S.*, for one year and a half next before and ending on the said 29th of *September*, and thence until and at the said time when, &c., held the said premises in which, &c., as tenant to defendant, by virtue of a certain demise to him *J. S.*, theretofore made, at the yearly rent of 500*l.*, and because 150*l.*, parcel of 250*l.* of the rent aforesaid, for half a year, ending as aforesaid, on

Where a tenant, by permission of the landlord, remained in possession of part of a farm after the expiration of the tenancy; Held, that the landlord might distrain on that part within six months after the expiration of the tenancy, the 8 *Ann.* c. 14. ss. 6 & 7. not being confined to a tortious holding over or to the holding of the whole farm.

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the 29th of *September*, and thence until and at the said time when, &c., was due and in arrear from *J. S.* to defendant, the residue having been paid, defendant avowed taking the goods in the said premises in which, &c., as a distress. Plaintiff pleaded several pleas in bar : on the first three, issues were taken. The fourth, which was to the first avowry, alleged, that after the 29th of *September* 1823, and before the said time when, &c., to wit, on, &c., at, &c., defendant, with the leave and licence of *J. S.*, entered into and upon the said farm in the first avowry mentioned, in and upon the possession of *J. S.*, and retook possession thereof; and the said *J. S.*, from the possession thereof, put out and amoved, and kept him so amoved from thence, until and after the said time when, &c., except as to certain parts, to wit, the premises in which, &c., which defendant suffered and permitted *J. S.* to occupy for a certain time not elapsed at the said time when, &c.; without this, that *J. S.* continued and was in possession of the whole of the said farm, in manner and form as defendant hath in his said first avowry alleged. Fifth plea in bar, that after the 29th of *September* 1823, and whilst *J. S.* was in possession of the said farm, &c., and before the said time when, &c., to wit, on, &c., at, &c., by a memorandum in writing, made between defendant and *J. S.*, and signed by them respectively, it was agreed that *J. S.* should, from that day, give possession of the *Grange* farm to defendant, he (defendant) allowing him the use of the orchard, *Little Redlands*, and home-closes, till the 25th day of *March* then next, for his own cows or sheep; that the said *J. S.* should have the use of the house and stable for his horses, till the said 25th day of *March*, if convenient to him to do so; that the said *J. S.* should plow for defendant such lands as he might direct, paying

ing him after the rate of 12s. 6d. per acre for such plowing; that defendant should send such other teams as he might require to plow, and get seed wheat into the ground, and that he should have the use of two rooms for a labourer, to superintend and work on the farm, with permission to enter with servants and workmen, to repair and work on the said farm; that defendant, in consideration of the above, would forego the next *Lady-day* rent, and all dilapidations on the buildings, and the land and the fences, as they then were, defendant agreeing to pay all taxes and levies charged or to be charged on the *Grange* farm, from that day to the 25th day of *March* then next; that *J. S.* should deposit 250*l.*, being his half year's rent, due *Michaelmas* then last, or secure it to be paid by instalments, when called upon by defendant; that defendant should have the use of the straw that had grown on the said farm in the last Summer, to eat, with his or other cattle, *J. S.* having permission to turn cows into the straw-yard, free of any expence. It was also further agreed, that defendant should receive the *Michaelmas* rent then due, in the following proportions: viz. 50*l.* *November* 5, 1823,—50*l.* *November* 20, 1823,—50*l.* *December* 25, 1823,—100*l.* *March* 20, 1824;—and plaintiff saith, that, in pursuance of the agreement, *J. S.* afterwards, and long before the said time when, &c., to wit, on 31st *October* 1823, at, &c., did give possession of the said farm, being the farm so alleged in the first avowry to have been held as aforesaid, and defendant had and continued to have possession thereof thenceforth, until and after the said time when, &c., save and except, that during that time the said *J. S.*, under and by virtue of the said agreement, had the use of the said orchard, &c., for his

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own cow and sheep, and the use of the said house and stable for his horses ; and this plaintiff is ready to verify, &c. General demurrer to fourth plea in bar, and joinder. Replication to the fifth plea in bar, after protesting that *J. S.* did not deposit 250*l.* for the half year's rent due at *Michaelmas* then last, averred that *J. S.* did not pay defendant 50*l.*, parcel of the said rent, on the 25th of *December* 1823, pursuant to the said agreement, but the same continued in arrear and unpaid, until and at the same time when, &c. Demurrer, assigning for cause that the defendant hath, by his replication, attempted to put in issue an immaterial fact, viz. whether *J. S.* did pay to defendant the sum of 50*l.*, parcel of the said rent, on the 25th of *December* 1823, when such payment, on that day in particular, was not nor is material ; and also, that the payment of the said sum of 50*l.* was not nor is a condition precedent. Joinder in demurrer.

Erskine, in support of the demurrer to the fourth plea in bar, and the replication to the fifth plea. The question in this case turns on the first avowry. Before the passing of the 8 *Ann. c. 14.*, a landlord could not distrain for rent after the expiration of the tenancy, although the tenant held over, and it made no difference whether the holding over was by permission or by wrong. By that statute, s. 6., it was enacted, " that it should be lawful for any person or persons having any rent in arrear, or due upon any lease for life or lives, or for years or at will, ended or determined, to distrain for such arrears after the determination of the said respective leases, in the same manner as they might have done if such lease or leases had not been ended or determined." The seventh section provides, " that such distress be
made

made within six calendar months after the determination of the lease, and during the continuance of the landlord's title or interest, and during the possession of the tenant from whom the arrears became due." The same privilege is by that enactment given to the landlord, whether the tenant holds over by wrong or by permission, nor does it make any difference if a new tenancy has been created between them; it merely requires that the possession of the tenant should continue. The avowry in this case is in the general form given by the 11 G. 2. c. 19., and contains all the averments necessary to bring the case within the 8 Ann. c. 14., viz. the possession of the tenant, and that the distress was made within six months after the determination of the tenancy, and during the continuance of the landlord's interest, *Staniford v. Sinclair*. (a) The fourth plea in bar is bad, because it furnishes no answer to the avowry; for it admits that the tenant remained in possession by permission of the landlord. [Bayley J. It may be made a question whether the 8 Ann. c. 14. applies, unless the tenant remains in possession of the whole farm.] In *Beavan v. Delahay* (b) the tenant was in possession of a part only, and there, as the tenancy continued, the Court held, that the landlord might distrain without the aid of the statute. It is, therefore, immaterial to this case, whether a new tenancy was created or not; and the fifth plea is no answer to the avowry; for after setting out at length the agreement entered into, it omits to state that the rent was paid, or satisfaction made for it, according to the agreement, *Lingham v. Warren* (c), *Hudd v. Ra-*

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(a) 2 Bing. 193.

(b) 1 H. Bl. 5.

(c) 2 B. & B. 36.

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venor. (a) It is, therefore, unnecessary to consider the replication.

Chitty, contra. The nature of the possession by *J. S.* at the time of the distress appears from the agreement set out in the fifth plea in bar. It was thereby stipulated that the tenant should give up possession of the farm, which expression denotes the whole matter that he held as tenant. The subsequent occupation by him was merely of a particular part, and for a limited purpose, and not as tenant. The stat. 8 *Ann. c.* 14. does not apply to such a holding, and at all events ought not to be so construed as to affect any but the immediate tenant, *Ex parte Bennett.* (b) Now the present plaintiff is a stranger to the tenancy, and also to the agreement. And this furnishes an objection to the replication to the fifth plea in bar; it alleges, that the instalment due at *Christmas* 1823 was not paid, but does not allege that it was not deposited or secured according to the agreement. That fact was in the knowledge of the defendant, but not of the plaintiff. The former, therefore, should have shewn it in pleading.

ABBOTT C. J. The fourth plea in bar raises two questions upon the construction of the stat. 8 *Ann. c.* 14. ss. 6. and 7. First, whether the holding over by the tenant must be tortious; and, secondly, whether it must be of the whole farm. I find nothing in the statute itself confining its operation to cases of a tortious holding over, or to a holding of the whole; and as it appears to have been made for the benefit of landlords, we must not

(a) 2 *B. & B.* 662.

(b) 2 *Str.* 787.

narrow the construction; there being no plain words making that necessary. The first avowry brings the landlord's right within the statute, and the fourth plea admits that the tenant remained in possession of a part of the premises; it therefore furnishes no answer. The fifth plea is bad for the same reason; for although it sets out the agreement and avers a performance, by giving up possession, yet it admits that the tenant continued in possession of part of the premises, and does not deny that the part of which possession was so retained, was the place in which the distress was made. The defendant is, therefore, entitled to judgment on both the fourth and fifth pleas in bar.

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Judgment for the defendant.

The KING *against* The Company of Proprietors
of the TRENT and MERSEY Navigation.

Saturday,
April 30th.

THE company were assessed to the relief of the poor of the parish of *Caldon*, in the county of *Stafford*, in the sum of 100*l.*, as occupiers of certain lime-stone quarries in that parish. On appeal, the sessions confirmed the rate, subject to the opinion of this court on the following case: By articles of agreement made the 10th of *April* 1776, between the *Trent and Mersey* Navigation Company and *T. G.* and several other persons, proprietors of the different lime-stone quarries at

The proprietors of certain lime-stone quarries agreed to deliver to a canal company yearly such quantities of good lime-stone as the canal company should direct, at the rate of 7*d.* per ton, and if they should at any time neglect to deliver the

quantities required, it should be lawful to the company to enter into or upon the lands or limestone quarries of any of the proprietors, and to take such quantities of limestone as they should think proper, paying 2*d.* per ton. The proprietors of the limestone quarries having failed to supply the limestone required, the company entered, and continued for more than twenty years to work the quarries, and take the limestone at 2*d.* per ton: Held, however, that the company had not any exclusive occupation, but a mere privilege, and consequently that they were not liable to be rated to the poor.

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or near *Caldon*, in the county of *Stafford*, according to their respective estates and interests in the said lime-stone, they, the proprietors, agreed with the company yearly, and every year for ever thereafter, to deliver to the said company, their successors or assigns, or to such person or persons, and at such time and times as the company or their clerk should nominate and appoint, such quantities of good and merchantable lime-stone ready got and broke in the pits and quarries where the same should be got, as the said company or their clerk or agent should yearly direct or appoint, at and after the rate of 7*d.* per ton for every ton of such stone, each ton to consist of twenty-one hundred weight, at 120 lbs. to the hundred (of which quantity notice was to be given before the last day of *October* in the preceding year); and further, that if they, their heirs or assigns, should at any time thereafter neglect or refuse to deliver such quantities as should be required, it should be lawful for the said company, their successors and assigns, and such person or persons as they or their clerk or agent should from time to time nominate and appoint, to enter into and upon the lands, grounds, or stone quarries of any of the said proprietors of lime-stone, their heirs, or assigns, and to get, take, and carry away such quantities of lime-stone as they should think proper, out of any of the pits or quarries aforesaid, paying after the rate of 2*d.* per ton, to be computed as aforesaid, for the same (such stone to be got in a regular and proper manner), which said articles of agreement were afterwards confirmed, with additional regulations, by an act of the 16 G. 3. c. 32. In pursuance of the said agreement and act of parliament, the proprietors of the said quarries of lime-stone did for some years supply the appellants

appellants at 7*d.* per ton, from certain quarries mentioned in the agreement and act of parliament; but having subsequently neglected to deliver the quantity of lime-stone required according to the agreement and act of parliament, the appellants, in 1795, by virtue of the said agreement, entered into a part of the land containing the lime-stone, called the quarter piece, in the act of parliament mentioned, situate in the respondent parish, which said part of the said land was in the occupation of *G. Woolscroft*, he being proprietor thereof with *R. Woolscroft*. The appellants have got the lime-stone out of thirteen acres of the said part of the land called the quarter piece (the whole containing seventeen acres), and still continue to get the lime-stone out of the remainder, paying the proprietors at the rate of 2*d.* per ton, according to the agreement and act of parliament. The appellants do not sell or make any profit of any of the said lime-stone within the respondent parish. They merely get the lime-stone out of a quarry, from which it is conveyed along a rail-road made for the purpose by the appellants, to a place called *Froghall*, situate in the parish of *Kingsley*, where it is sold to other persons, who burn it into lime. For some time previous to the time of the rate, whilst the appellants were so getting the said lime-stone, the said *G. Woolscroft* was in the occupation of the surface of the said part where the appellants were not actually working, and has planted part of the land from which the lime-stone has been got. During such time also the said *G. W.* has been rated to the relief of the poor of the respondent parish in respect of the said part of the said land called the quarter piece, and has paid 6*l.* as his rate for the same, until *January 1822*, when his rate was reduced to 2*l.*, and a

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1825. rate of 4*l.* imposed upon the appellants in respect of
 ——— their assessment for the lime-stone quarries so worked
 The King against by them under the said agreement and act of parlia-
 The Tarent and ment.
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Campbell and *Ryan*, in support of the order of sessions, contended, that upon this statement, the company must be considered as the occupiers of the lime-stone quarries, *Rex v. All Saints, Derby*.^(a) They are in possession of the immediate profits of the land, and that is sufficient to make them rateable, *Lord Bute v. Grindall*.^(b) In *Rowls v. Gell*^(c) and *Rex v. St. Austell*^(d) the lord receiving a portion of ore by way of rent, was held rateable for that; and it seems to have been taken for granted that the persons working the mines would be rateable for the residue, were it not for the implied exemption in the statute 43 *Eliz. c. 2.* in favor of such adventurers. The last two cases also shew that a party may be rateable without having an exclusive occupation.

Scarlett, Nolan, W. E. Taunton, Russell, Balguy, and *Caldwell*, contra, contended, that the company had a mere licence to enter and take lime-stone at a certain price, and had no occupation of the quarry to the exclusion of other persons, for that there was nothing in the contract entered into which could prevent the owners of the quarry from getting stone there themselves, or permitting others to do so. In *Rex v. Joliffe*^(e) the defendant was held not to be rateable in respect of a

(a) 5 *M. & S.* 90.

(b) 2 *H. Bl.* 265.

(c) *Cowp.* 451.

(d) 5 *B. & A.* 693.

(e) 2 *T. R.* 90.

rail-road, because he had not the exclusive occupation of the soil; and in *Rex v. Bell* (b) the defendant was held to be rateable for such a rail-road, because in the latter case he had the exclusive occupation. Applying those cases to the present, it is clear that the Navigation Company were not rateable for the lime-stone quarries.

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The Court desired that the case might go down to the sessions again in order to ascertain whether the company had been in the exclusive occupation of the quarry. In order to save expence, affidavits were filed, by which it appeared that the owners of the quarry having, in 1796, failed to furnish the company with the stone required, they entered, and had ever since worked the quarry themselves, paying 2*d.* a ton for the stone gotten. No other person had ever worked or attempted to work stone there except the company. These affidavits having been commented upon by each side,

ABBOTT C. J. now gave judgment. This question came before the Court under such peculiar circumstances that it was not likely that any case would be found bearing materially upon it. None such has been discovered; nor is it probable that our decision can form a precedent for any other case. The question is, whether under the contract set out in the case, and that which has taken place under it, the company were occupiers of the quarry in respect of which they were rated. The contract is, that the owners of the quarry shall supply, at a certain price, as much stone as the company think fit to

(a) 7 T. R. 598.

order;

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Mersey
Navigation Co.**

order; and that if they neglect to do so, the company may enter and work the stone for themselves, paying to the owners a certain sum for every ton so worked. The owners having neglected to supply the stone ordered, the company many years ago entered, and have ever since worked the quarry for themselves; and, in point of fact, no one else has ever got stone there. But the right of the company was merely to get there what stone they might think fit; there was nothing in the contract to prevent the owner from giving to others also the privilege of getting stone in the same quarry. The company therefore had not any sole and exclusive occupation, but a mere privilege, and, consequently, were not liable to be rated to the relief of the poor.

Order of sessions quashed.

*Saturday.
April 30th.*

The KING *against* **THACKWELL** and Others,
Churchwardens and Overseers of the Poor of
MONMOUTH.

Where over-seers' accounts, allowed by three justices, were delivered to the successors so late that they could not appeal to the next sessions: Held, that an appeal to the next practicable sessions was in time, and that the justices might then respite the appeal although the respondents objected to the delay.

THE late churchwardens and overseers of the poor of the parish of *Monmouth*, went out of office on the 25th of *March* 1824. Their accounts were allowed by three justices on the 27th. On the 28th successors were appointed. On the 7th of *April* the next quarter sessions were held at *Usk*, thirteen miles from *Monmouth*. On the same day at two o'clock, when it was too late to enter an appeal, the late churchwardens and overseers delivered their accounts, allowed as aforesaid to their successors. At the Midsummer sessions, an appeal against the allowance of those accounts was entered and respited,

respite, although the respite was objected to by the respondents; and at the *Michaelmas* sessions, the order for the allowance of the accounts was quashed. The order of sessions having been removed by certiorari, and a rule obtained for quashing it,

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—
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against
THACKWELL.

Macle, in support of the order, contended, that as the accounts of the late overseers were not delivered until it was too late to examine them and enter an appeal at the *Easter* sessions, the Midsummer sessions were for this purpose to be considered as the next after the allowance, and that the justices did right in suffering the appeal to be then entered and respited.

Campbell contra. By the 17 G. 2. c. 38. s. 4., an appeal against the accounts is given to the next quarter sessions, and the justices there assembled are required to receive the appeal, and to hear and finally determine the same; "but if it shall appear to the said justices that reasonable notice was not given, then they shall adjourn the said appeal to the next quarter sessions, and then and there finally hear and determine the same." Upon this enactment it is plain, that supposing the appeal to the Midsummer sessions to be in time, still the justices had no power to adjourn it. That power is limited to cases where reasonable notice has not been given. Here, so far from objecting to the insufficiency of the notice, the respondents objected to the adjournment of the appeal. But it is not clear that the appeal at the Midsummer sessions was in time, the accounts were allowed on the 27th of *March*, the appeal might therefore have been to the sessions holden on the 7th of *April*,

1825. *April, Rex v. Justices of Worcestershire. (a)* [Bayley J.
The appeal must be to the next practicable sessions,
Rex v. Justices of Essex. (b)

—
The KING
against
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ABBOTT C. J. It is quite clear, that under the circumstances of this case the parties were not bound to appeal at the *Easter* sessions, and at Midsummer, it was for the justices and not for us to decide whether it would be proper to respite the appeal to *Michaelmas*.

Order confirmed.

(a) 5 M. & S. 457.

(b) 1 B. & A. 210.

Saturday,
April 30th.

The KING against ILKESTON.

An apprentice, who lived and worked with his master in the parish of *I.*, went home to his father's in the parish of *R.* every *Saturday*, and slept there on *Saturday* and *Sunday* nights, (with his master's leave,) and returned to work on *Monday* morning. The apprentice having returned, and worked as usual on a *Monday*, left his master in the evening, and never returned: Held, that the sleeping in *R.* being merely by way of indulgence, and not for the purposes of the apprenticeship, was not sufficient to confer a settlement.

THE pauper, *Ann Whinyates*, was removed by an order of two magistrates from *Radford* to *Ilkeston*. The sessions on appeal confirmed the order, subject to the opinion of this Court, upon the following case. *John Whinyates*, the pauper's husband, was bound apprentice by indenture dated 22d *December* 1818, for the term of seven years, to *Benjamin Roberts*, a boat-builder, an inhabitant of *Ilkeston*. During the first two years of his apprenticeship, the pauper's husband lodged with his father in the parish of *Radford*, serving his master in *Ilkeston*. Afterwards he worked and lodged with his master in *Ilkeston*, but regularly, and with the knowledge and consent of his master, went to his father's at *Radford* on the *Saturday* night, and slept there on the *Saturday* and *Sunday* nights, and returned

to

to his master at *Ilkeston* on the *Monday* morning. On the *Saturday* before the *Nottingham* fair, in the month of *October* 1822, the pauper's husband went to his father's as usual, and slept there on the *Saturday* and *Sunday* nights, and returned to his master's on the *Monday* and worked for him that day, and in the evening asked and obtained his master's permission to go home again, for the purpose of being at the fair at *Nottingham* on the following day. He left his master that evening accordingly, and never returned, having enlisted for a soldier a few days afterwards. The pauper's husband did no work for his master in *Radford* on the *Saturday* night and *Sunday*, nor at any other time while he was at his father's. The indentures were retained by the master, till applied for some days after the pauper had enlisted, when he gave them up.

1822.

The King
against
Ilkeston.

Marryat, (with whom was *S. Phillipps*), in support of the order of sessions. The settlement of the pauper was in *Ilkeston*, and not in *Radford*. The occasional residence with his parents in the latter parish was not connected with the purposes of the apprenticeship, but was merely an indulgence granted by the master. It was not therefore such a residence as could confer a settlement, *Rex v. Ribchester* (a), *Rex v. St. Mary Bredin* (b), *Rex v. Brotton*. (c) (He was then stopped by the Court.)

Balguy and *N. R. Clarke* contra. It has long been settled that an apprentice gains a settlement where he sleeps and not where he serves. [*Bayley* J. That is

(a) 2 M. & S. 135.

(b) 2 B. & A. 382.

(c) 4 B. & A. 84.

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The KING
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ILKESTON.

where he sleeps for the purposes of the apprenticeship.] The pauper slept in *Radford* for the purposes of the apprenticeship, he went there with the consent of his master, and in order to return to his work on the *Monday* morning. There is nothing to shew that the master had not at all times a control over the apprentice, and the case states, that the latter finally quitted his master's service on a *Monday* evening, having worked with him during that day, and having slept in *Radford* the preceding *Sunday* night. At that time, therefore, he had the intention of returning, which was proved by his actual return to the master's service on the following day. The case is therefore entirely different from *Rex v. Ribchester*. There the pauper went away on a *Saturday* and never returned, and the case was decided on the ground, that *Friday* must be considered as the last night of the apprenticeship, and accordingly the apprentice was held to be settled where he slept on that night. Here the pauper continued in the service of his master on the *Sunday* night, for he returned as usual and worked for him on the *Monday* morning; he therefore gained a settlement in *Radford*, where he slept on that night. In *Rex v. St. Mary Bredin* and *Rex v. Brotton*, the service was clearly relinquished for a period by the master; here, it does not appear that he ever relinquished it at all. The apprentice never worked for his master on *Sunday*, and *Rex v. Castleton (a)* shews that if the apprentice had, without asking his master's leave, gone home on *Saturday* and *Sunday* nights to sleep in *Radford*, he would have gained a settlement there; and the express assent of the master to this

(a) *Burr. S. C.* 569.

sleeping

sleeping in *Radford* cannot vary the case, *Rex v. Stratford-upon-Avon*. (a)

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The King
against
ILKESTON.

ABBOTT C.J. I am of opinion that the pauper did not gain a settlement in *Radford*, the place of his father's residence, at which he slept on *Saturday* and *Sunday* nights, but at *Ilkeston*, the place of the master's residence, where he slept the other five nights in each week. The words of the 3 *W. & M. c. 11. s. 8.* are, "If any person shall be bound an apprentice by indenture, and inhabit in any town or parish, such binding and inhabitation shall be adjudged a good settlement." The true construction of that provision appears to be, that the inhabitation must be in the character of an apprentice, and in some way or other in furtherance of the object of the apprenticeship. An inhabitation by indulgence then is not within the statute. The case before us states, that the pauper worked and lodged with his master in *Ilkeston*, but, with [the consent of his master, went on *Saturday* night to his father's at *Radford* and spent *Sunday* with him, and returned to his work on *Monday* morning; that certainly was a residence in *Radford* by indulgence only. There may, indeed, be cases, and some such have arisen, where an inhabitation in a parish different from that in which the master resides may be in furtherance of the service; for instance, where a master cannot take an apprentice into his own house, and appoints or allows him to choose a residence in another parish, so that he may return to his work every morning. But the facts of this case shew, that the sleeping in *Radford*, was merely for re-

(a) 11 *East*, 176.

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creation, and had no connection with the service. The apprentice did not therefore gain any settlement in that parish, and the order of sessions was right.

BAYLEY J. Where the master appoints no place for the pauper to sleep, or appoints a place out of the parish where the service is performed, I agree that a settlement is gained in the parish where the apprentice sleeps, and that was the ground on which *Rex v. Castleton* and *Rex v. Stratford-upon-Avon* proceeded. *Le Blanc* J. expressly put the latter case, on the ground that the pauper slept in *Old Stratford* as an apprentice. But if an apprentice in general resides with his master, and is allowed once a week, as an indulgence, to visit his parents in another parish, he does not lodge there as an apprentice, and I cannot see that the case is varied, whether the indulgence be for days or for months. If so, this case is decided by *Rex v. St. Mary Bredin* and *Rex v. Brotton*.

HOLROYD J. concurred.

Order of sessions confirmed. (a)

(a) *Littledale* J. was in the Bail Court.

1825.

HICK *against* KEATS, (in Error.)Tuesday,
May 2d.

DEBT on a joint and several bond, given by the plaintiff in error and one *T. M. Keats*, conditioned to pay defendant in error an annuity of 40*l.* per annum for her life. Pleas, first, non est factum; second, that before the making of the bond, plaintiff having for several years carried on the wine and spirit trade, was on, &c., at, &c., induced, at the request of her sons, *T. M. Keats* and *J. Keats*, to sell her said trade and business, and she did then and there accordingly sell the same, and the money arising therefrom, together with whatever money she possessed, amounting to 1000*l.*, she the said plaintiff did then and there advance to her said two sons, to place them out in business; and that in consideration thereof, it was thereupon, afterwards, to wit, on, &c., at, &c., agreed by and between the said plaintiff and her two sons, that each of them should give her an annuity bond of 40*l.* per annum; and that they should get some person or persons to join them by way of further security for the punctual payment of such two several annuities; and the said defendant further saith, that, in pursuance of the said agreement so made as aforesaid, he the said *T. M. Keates* and the said defendant, as security for the said *T. M. Keats* as aforesaid, afterwards, to wit, on the same day and year last aforesaid, at *London* aforesaid, made and sealed, and as their act and deed delivered to the plaintiff the

Debt on bond. Plea, that before the making of the bond, plaintiff carried on the wine and spirit trade, and was induced by her two sons to sell it; that she did sell it, advanced the proceeds and what other money she had, amounting to 1000*l.*, to her sons, to place them out in business, and thereupon afterwards, it was agreed that each of the sons should give her a bond with a surety, to secure the payment of an annuity of 40*l.* per annum. That the bond in question was given in pursuance of that agreement, and for the considerations therein mentioned, and no memorial of it enrolled, wherefore the bond was void. Replication, that the bond was not given in pursuance of the agreement and for the considerations mentioned in the plea. The jury found that it was so given, in the terms of the plea: Held, that the plea did not shew the annuity to have been granted for a pecuniary consideration, so as to bring it within the 17 G. 3. c. 26., and the plaintiff had judgment.

There were other pleas upon which issues were taken, and the jury not having found any verdict as to them, the Court awarded a venire de novo.

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said writing obligatory in the said declaration mentioned ; and the said plaintiff then and there accepted and received the said writing obligatory, with the condition thereunder written, of and from the said *T. M. Keats* and the said defendant, in pursuance of the said agreement, and for the consideration aforesaid ; and the said defendant further saith, that no memorial of the said writing obligatory in the said declaration mentioned was inrolled in the High Court of Chancery within twenty days of the execution thereof, according to the directions of a certain act of parliament made and passed in the seventeenth year of his late majesty King *George* the Third, whereby the said writing obligatory in the said declaration mentioned is null and void. Replication ; that the said defendant did not deliver the said writing obligatory, nor did the said plaintiff accept the same in pursuance of the said agreement, and for the consideration in the said second plea mentioned, in manner and form as the said defendant hath above thereof in that plea alleged. As to the second issue within joined between the parties, the jury found that the said defendant did deliver the said writing obligatory, and the said plaintiff did accept the same, in pursuance of the agreement, and for the consideration in the second plea within mentioned, in manner and form as the said defendant hath within in that plea alleged. There were other pleas and issues joined on them, but as to them the jury found no verdict. Upon this finding the Court of Common Pleas gave judgement for the plaintiff, and a writ of error having been brought, the case was now argued by

Campbell, for the plaintiff in error. This annuity cannot be considered as given for natural love and affection,

fection, for the Court must take that to have been the consideration which is stated in the plea, and which has been found by the jury, viz. the money advanced by the plaintiff below to her sons. The only question is, whether an antecedent debt is such a pecuniary consideration as is contemplated by the 17 G. 3. c. 26. There would be no difficulty in framing the memorial of such a consideration; for it seems to be much the same, whether the consideration is stated to have been money paid at the time of the grant or seven years before. The eighth section of the act is material, for that excepts out of the operation of the act several sorts of annuities; but the only exception which can now be relied on, is that of annuities granted without regard to pecuniary consideration. [Abbott C. J. How does it appear that there was any antecedent debt due to Mrs. Keats, there is nothing to shew whether she advanced the money to her sons by way of loan or gift. Bayley J. If a parent advances money to a child, it is supposed to be by way of gift.] In ordinary cases, if it is said, that A. advanced 1000*l.* to B., that is sufficient to shew a debt, and here it cannot be said that the annuity was granted without regard to pecuniary consideration, for the jury have found that it was in pursuance of the agreement, and for the consideration in the second plea mentioned. [Bayley J. It has been held that even without the aid of the eighth section voluntary annuities would be out of the operation of the act.] In *Crespigny v. Wittenoom* (a), *Hutton v. Lewis* (b), and *Horn v. Horn* (c), where it was so held, no pecuniary consideration appeared in the plea. Here such a consideration is shewn. *Doe v. Phil-*

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(a) 4 T. R. 790.

(b) 5 T. R. 639.

(c) 7 East, 529.

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Lips (a) is distinguishable, for there no money passed between the grantor and grantee; but *Crosley v. Arkwright* (b) is very like the present case, and there the deed was held to be void for want of a memorial.

Tindal, contra, was stopped by the Court.

ABBOTT C. J. I am of opinion, that the plea upon which judgment was given in the Court of Common Pleas does not bring the case within the stat. 17 G. 3. c. 26., which was the act regulating annuities, at the time when that in question was granted. The object of that statute, as appears by the title, and almost every clause of it, was to prevent the imprudent sale of annuities. Now can we, upon a fair consideration of the second plea on this record, say that the annuity was granted for a money consideration. The plea begins by stating, that Mrs. *Keats* was induced, at the request of her two sons, to sell her trade and business, and that she did accordingly sell the same, and the money arising therefrom did then and there advance to her sons, to place them out in business. There the matter stops for a time, and the plea goes on to state, that in consideration thereof it was afterwards agreed, that each of the sons should give her a bond, with a surety for payment of an annuity of 40*l.* per annum; and then it avers that the bond declared on was given in performance of that agreement, and for the consideration aforesaid. The issue is on the replication negating the plea in terms. The jury have found that the bond was given

(a) 1 Taunt. 356.

(b) 2 T. R. 603.

in pursuance of the agreement and for the consideration aforesaid, that is, in consideration that the mother had at some antecedent time advanced the money; but it is not found, that, at the time of making the advance, she stipulated for the grant of the annuity. The plea, therefore, does not bring the case within the statute, and, consequently, is no bar to the action; but as there are other pleas on the record, good in form, and upon which nothing was done at the former trial, there must be a venire de novo.

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BAYLEY J. The whole purview of the act in question is confined to annuities granted in consideration of money, and there are many cases where that has been decided, and which *Mr. Campbell* has in vain endeavoured to distinguish from the present. If, at the time when the money was advanced, it had been part of the bargain that an annuity should be granted, I should have agreed that it came within the act. But it does not appear that this advance was conditional, or that any terms were at that time imposed on the sons.

HOLROYD J. I think that there must be a venire de novo, although the plea now before the Court is bad. It is intended to avoid the bond upon which the plaintiff below sued, and must, therefore, be construed strictly; and it is not sufficient unless it shews clearly that there was a sale of the annuity. Now the plea divides the whole transaction into two parts; first, the sale of the business and the advance of the money, and then afterwards the undertaking by the sons to grant and secure an annuity, which upon this plea must be taken

as

1825. as a voluntary grant, and not a part of the original transaction.

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against
KEATE.

LITTTLEDALE J. concurred.

Venire de novo awarded.

Wednesday,
May 4th.

The KING against The Company of Proprietors
of the OXFORD Canal Navigation.

By a canal act, the proprietors of the *Oxford* canal were empowered to take a certain sum per ton per mile upon all goods. By a subsequent act for making a new canal, reciting that it was apprehended that the making of the intended canal would be injurious to the proprietors of the *Oxford* Canal, and that it had been agreed that an indemnification should be made to them, as a compensation for such injury,

It was enacted " That, instead of the mileage duty payable to the proprietors of the *Oxford* Canal, it should be lawful for them to take, for all coals which should pass from the *Oxford* Canal into and upon the said intended canal, so much per ton, without any regard to the distance the same should pass along the *Oxford* Canal; and for all other goods which should pass from any other navigable canal into and upon the *Oxford* Canal, and from thence into and upon the said intended canal, or from the intended canal into and upon the *Oxford* Canal, and from thence into and upon any other navigable canal, a certain other sum per ton, without regard to the distance the same should pass from the said *Oxford* Canal: Held, first, that the proprietors of the *Oxford* Canal were rateable to the poor in respect of their mileage duty in every parish through which the canal passed.

Secondly, that they were liable also to be rated in every parish along which the canal passed for a proportion of the compensation duty.

Coventry

Coventry Canal Navigation to the city of Oxford," and by virtue of the powers given to them by this act, they purchased and are now the owners of the canal and towing-path in the respondent parish, having no other lands, nor occupying nor possessing any other property therein. By the above act they are empowered to demand the payment of tonnage and wharfage at a certain rate per mile for all coal, stones, timber, and other goods carried upon or through their canal; and the tonnage commonly taken by them at the time of making the above rate was 1*d.* per ton per mile for coals, and 1*s.* 2*d.* per ton per mile for other sorts of merchandize. This tonnage is usually called the mile tonnage, as distinguished from the compensation tonnage hereinafter spoken of. By a subsequent act of parliament of the 33 G. 3. c. 80., which was an act for making a new canal to be called the Grand Junction Canal, after reciting that it was apprehended the making of the intended canal would be injurious to the company of proprietors of the *Oxford Canal Navigation*, and that it was agreed that the compensations thereinafter mentioned should be made to them, as an indemnification against any such injury, it was, amongst other things, enacted, that instead of the tolls, rates, and duties which would have been payable to the company of proprietors of the *Oxford Canal* by virtue of the above-mentioned act of the 9 G. 3., and certain other acts of parliament for or in respect of the coals, goods, and other things thereafter mentioned, and made chargeable with certain rates to the said company, it should be lawful for the said company of proprietors of the *Oxford Canal Navigation* to ask, demand, take, and receive to and for their own proper use and behoof, the respective rates thereinafter mentioned;

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mentioned; that is to say, "for all coals which should pass from the said *Oxford* Canal into or upon the said intended canal, the sum of 2s. 9d. per ton, and so in proportion for a less quantity than a ton, without any regard to the distance the same should pass upon the said *Oxford* Canal; and for all other goods, wares, merchandizes, and things which should pass from any navigable canal into or upon the *Oxford* Canal, and from thence into or upon the said intended canal; or from the said intended canal into or upon the said *Oxford* Canal, and from thence into or upon any other navigable canal (except certain articles in the act specified), the sum of 4s. 4d. per ton, and so in proportion for a less quantity than a ton, without any regard to the distance the same should pass upon the said *Oxford* Canal."

The act then provides for the collecting and recovering this last-mentioned tonnage; and also that, in the event thereafter of such tonnage not amounting to certain specified sums within each year, the company of proprietors of the intended canal should make good the difference; and it points out the mode of ascertaining and recovering such difference. The tonnage payable to the appellants under this last-mentioned act is usually called the compensation tonnage. No part of the mile or compensation tonnage is collected in the parish of *Sow*. The entire length of the *Oxford* Canal is ninety-one miles. The Grand Junction Canal unites with it at *Braunston*, and the distance from that place to where it joins the *Coventry* Canal is thirty-four miles, seven-eighths of which, two miles and one-eighth, are in the respondent parish. This latter canal is the only navigable canal which joins the *Oxford* in this its northern part, and the proprietors thereof take the tonnage of
coals

coals upon two miles of the *Oxford* Canal, being the first two miles from the junction thereof with the *Coventry* Canal at *Longford*, and the proprietors of the *Oxford* Canal take the tonnage of all merchandize (except coals) which are carried upon any part of the *Oxford* Canal, and afterwards upon the *Coventry* Canal, within three miles and a half from the junction of the two canals at *Longford*, towards *Coventry*. For coals which pass along the *Oxford* Canal, in the respondent parish, the appellants receive the mile tonnage, if they do not afterwards enter the Grand Junction Canal; but if they do, then they receive the compensation tonnage only, whether they have passed into the *Oxford* Canal from any other canal or not. For other sorts of merchandize which pass from the *Coventry* Canal into the *Oxford* Canal, and thence into the Grand Junction Canal, or from the Grand Junction Canal into the *Oxford* Canal, and thence into the *Coventry* Canal, in both which cases such merchandize must necessarily pass through the parish of *Sow*, they receive the compensation tonnage; but in all other cases they receive the mile tonnage. The compensation tonnage is never exactly what the mile tonnage would have been. The appellants derive no profit whatever from their land in the parish of *Sow*, except from the tonnage payable to them by virtue of the above mentioned acts of parliament, if any part of that tonnage can legally be considered as such. The occupiers of land in the parish of *Sow* are rated in the present assessment upon their respective rents, taking those rents as the criterion of the value of the land. The appellants are rated upon the full amount of their tolls, which are calculated to amount to 1200*l.* per annum,

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annum, whereas the same tolls are worth only 1000*l.* per annum to be rented by a third person.

The questions for the opinion of the Court were,

First, whether the appellants were liable to be rated for any of their tolls in the parish of *Sow*. If not, the assessment on the appellants in the parish of *Sow* was to be struck out of the rate.

Secondly, whether they were liable to be rated in the parish of *Sow* for part of the compensation tonnage for coals passing out of the *Oxford* Canal into the Grand Junction Canal, which had passed along the *Oxford* Canal in the parish of *Sow*. If they were not, four twenty-fourths of the sum at which they were assessed were to be deducted from the assessment.

Thirdly, whether they were liable to be rated in the parish of *Sow* for part of the compensation tonnage received in respect of merchandize (not being coals) passing out of any navigable canal into the *Oxford* Canal, and thence into the Grand Junction Canal, in respect of such part of the said merchandize as had passed along the *Oxford* Canal in the parish of *Sow*. If they were not, then eight more twenty-fourths were to be deducted from the sum assessed on the appellants.

Fourthly, whether they were liable to be rated in the parish of *Sow* for part of the compensation tonnage received in respect of merchandize (not being coals) passing out of the Grand Junction Canal into the *Oxford* Canal, and thence into any other navigable canal, in respect of any such part of the said merchandize as had passed along the *Oxford* Canal in the parish of *Sow*. If they were not, then five more twenty-fourths were to be deducted from the sum assessed on the appellants.

Fifthly,

Fifthly, supposing the appellants to be rateable in respect of the above tolls, or any part of them, in the parish of *Sow*, whether the sum on which they were assessed in the above rate ought not to be reduced to the amount which such tolls would be worth to be rented by a third person. The several acts of the 9th, 15th, and 26th G. 3. for making and maintaining the *Oxford Canal*; as also the 33 G. 3. c. 80., called the *Grand Junction Canal Act*, were to be considered as part of the case.

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The *Attorney General*, *Adams Serjt.*, and *Tindal*, in support of the order of sessions. The *Oxford Canal Company* were liable to be rated for a certain proportion of their tolls in the parish of *Sow*. [*W. E. Taunton* admitted, that after the cases of *Rex v. Milton* (a), *Rex v. The Aire and Calder Navigation* (b), *Rex v. Page* (c), *Rex v. The Proprietors of the Staffordshire and Worcestershire Canal* (d), *Rex v. Trent and Mersey Navigation* (e), and *Rex v. Palmer* (f), the company were liable to be so rated.] They are liable also to be rated in respect of the compensation duty which is granted them by the 33 G. 3. c. 80. s. 10. By that act the proprietors are authorized to take, in lieu of the mileage duty to which they were before entitled, the following rates; first, for all coals which should pass from the *Oxford Canal* into or upon the said intended canal, the sum of 2s. 9d. per ton, without any regard to the distance which the same should pass upon the *Oxford Canal*; and then for all other goods, &c. which should pass from any

(a) 3 B. & A. 112.

(b) 2 T. R. 660.

(c) 4 T. R. 543.

(d) 8 T. R. 340.

(e) 1 B. & C. 545.

(f) 1 B. & C. 546.

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navigable canal into or upon the *Oxford* Canal, and from thence into or upon the said intended canal, or from the said intended canal into or upon the *Oxford* Canal, and from thence into or upon any other navigable canal (except certain articles in the act specified), the sum of 4s. 4d. per ton, without any regard to the distance the same should have passed upon the *Oxford* Canal. Before the passing of this act the *Oxford* Canal Company were entitled to take certain tolls in respect of which they would have been rateable in each parish along which the canal passes, and the compensation is granted to them by the latter act in lieu of the mileage duty, to which they otherwise would have been entitled. Now as the *Oxford* Canal Company would have been rateable in the parish of *Sow* in respect of a certain proportion of the mileage duty, they must be rateable in the same proportion of that duty which is given as an equivalent for it. And there is no distinction in principle between coals and any other goods. There was originally a mileage duty. That, for convenience, was changed to a gross sum, and the whole question is, whether that sum is to be subject to the same burden as the former duty. As to the last question put to the Court, it must be admitted that the appellants are rateable for that amount only which such tolls would be worth if let to a third person.

W. E. Taunton, Holbeck and Goulburn, contra. The compensation duty does not necessarily constitute any part of the profits of the land belonging to the company in the parish of *Sow*; it is not, therefore, the subject of rate in that parish, although it may be true that it was substituted in lieu of that which was rateable. It must be

be admitted, also, that the company were rateable in respect of the mileage duty, but now as much duty is paid for passing along a small part as through the whole of the canal. The company earn nothing in respect of their land in the parish of *Sow*, because the same compensation duty would be payable to them if the land in the parish of *Sow* was not passed over. [*Bayley J.* The canal, as a whole, is the cause of the compensation duty, and, therefore, it is earned in respect of the whole line of the canal, and, of course, a proportion of it in respect of that part which is in the parish of *Sow*.] The proximate and not the remote cause of the compensation duty is to be considered. Now the proximate cause by which the compensation duty becomes payable, is, that the goods pass into or out of the *Oxford* Canal; and, therefore, if rateable at all, it ought to be rated in the parish of *Braunston*, where they are to pass into or out of the canal. Suppose there had been a payment in gross 5000*l.* in one year, 3000*l.* in another, 4000*l.* in another, and 3000*l.* in another, with respect to any particular place, the company would not have been rateable in respect of those sums; but if rateable at all they are only rateable in the parish where the compensation duty becomes payable, as in the case of a sluice. In that case the tolls become due for the use of the sluice itself; and the proprietors contribute to the relief of the poor in that parish where the sluice is situate. So in this case, the compensation duty becomes payable, only because the goods pass into or out of the *Oxford* Canal.

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ABBOTT C. J. I think that the *Oxford* Canal Company are rateable in the parish of *Sow*. We must consider the two acts as containing one statutable enactment, and the effect of them is this, that for coals pass-

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ing along the *Oxford* Canal, and not going into the Grand Junction Canal, there shall be paid so much per mile per ton, and it is clearly established by *Rex v. Milton* (a), that the proprietors are rateable, as the occupiers of the canal, or land covered with water, for the mileage duty, as profits arising out of that land so used, and in every parish through which the canal passes, in respect of the land there situate and so used for the canal; but as to coals passing into the Grand Junction Canal, instead of a toll per mile, the stat. 33 G. 3. enacts, that there shall be paid a fixed sum, without regard to distance; but still that fixed sum or compensation duty is earned, in consequence of the goods passing along the *Oxford* canal: and part of it must be considered as earned in every parish along the line of that canal. *Sow* is one of the parishes in respect of which the compensation duty arises, and the company are rated for that proportion of the whole which is earned in the parish of *Sow*. It is called a compensation duty, but, in fact, it is a rate given for coals passing along the canal. This being so as to coals, there is no difference as to other goods, except that they must come from some other canal; but that cannot vary the construction of the statute.

Then, as to the amount, it appears that other lands are rated according to the amount which would be obtained by letting them at a rent, this company, therefore, must be rated according to the same rules; and, consequently, ought to be assessed in respect of property valued at 1000*l.*, and the sum at which they are to be assessed must be 50*l.* The order of sessions must, therefore, be amended.

BAYLEY J. The compensation duty stands upon the

(a) 3 B. & A. 112.

same footing as the mileage duty, and each is liable to be rated. Now the mileage duty is rateable, because it is the profit accruing from land covered with water, and the towing-path for each mile over which the goods are conveyed, and the compensation duty, is the profit arising from the land covered with water, and the towing-path through the whole line of the canal, and the Company are rateable for the proportions earned by them in each parish through which the canal passes. The Grand Junction Canal might have occasion to use the *Oxford* Canal, and they therefore made a bargain to give a compensation to the *Oxford* Canal Company for going along the whole line from one to the other; that was beneficial to the *Oxford* Canal. The terms on which the Grand Junction Canal Company are at liberty to use the canal, are 2s. 9d. per ton for coals, and 4s. 4d. per ton for other goods. It has been said, that the compensation is payable for passing into and out of the *Oxford* Canal at *Braunston*, and that it is like the case of a sluice, the proprietors of which are rateable in the parish where they are paid. If that were so, I should think the company were not rateable in *Sow*; but the fallacy is in the premises, for the compensation is not for passing into or out of the *Oxford* canal, but for using it.

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HOLROYD and LITLEDALÉ Js. concurred.

The rule drawn up was for amending the rate, by reducing the sum assessed upon the defendants for and in respect of the towing-path land, and that part of the *Oxford* Canal which lies within the parish of *Sow*, and the tolls and dues accruing thereupon, to the sum of 1000*l.*, and by reducing the assessment made thereon to the sum of 50*l.*

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A pauper was hired three weeks before *Martinmas* at 4*l.* wages, and received 1*s.* earnest, but no period was mentioned for duration of the service. The pauper went into the service a week after *Martinmas*, and upon the same day his master told him that it was not the custom to hire servants in that parish for more than fifty-one weeks, that he forgot to mention it at the time when he hired him, and therefore, that, if he had no objection, he would hire him again for fifty-one weeks, and give him another shilling for earnest.

The pauper accepted it, and remained in the service till the following *Martinmas*. There not having been a year's service, the sessions held that there had been a dissolution of the original contract, and not a dispensation with the week's service: Held, that that was a question of fact for the sessions, and they having determined it, this Court refused to disturb their decision.

UPON appeal against an order of two justices, for the removal of *J. Whitehead* and *Mary* his wife, from the parish of *Bottesford*, in the county of *Leicester*, to the parish of *East Bridgford*, *Nottingham*, the court of quarter sessions quashed the order, subject to the opinion of this Court on the following case:

The pauper, *John Whitehead*, was hired at the *Bingham* statutes, which happened about three weeks before *Martinmas* 1818, to serve one *Huskinson*, of *East Bridgford*, as a servant in husbandry, for the wages of 4*l.*, and received 1*s.* earnest, but no time was mentioned for the duration of the service. He was to go into the service about a week after *Martinmas*, at the regular time for husbandry servants to enter their places. The pauper, who was the only witness examined by the Respondents, stated, that he entered into the service a week after *Martinmas* 1818; that on the same day on which he arrived at his master's house, his master said to him, "It is not the custom to hire servants in this parish for more than fifty-one weeks, which I forgot to mention to you at the time I hired you at *Bingham* statutes; and therefore, if you have no objection, I must hire you afresh for fifty-one weeks, and give you another shilling for earnest;" when the pauper accepted of such earnest.

The

The pauper was never out of *Huskinson's* service from the first moment he came upon the premises, and remained therein at *East Bridgford*, until the day after *Martinmas* 1819, when he quitted his place along with other servants, having first received his wages of 4*l*.

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Scarlett, *Marriott*, and *Humfrey*, in support of the order of sessions. Assuming that the contract being indefinite in this case, must be taken as a hiring for a year, still there was no service under that yearly contract, for on the very day when the pauper came to his master a new bargain was made for fifty-one weeks. Besides, the pauper did not stay a whole year in the service, and the sessions were well warranted, from the facts, in considering that there was a dissolution of the contract, and not a dispensation with the week's service.

S. M. Phillips and *Hildyard*, contra. The hiring in this instance being general, must be taken to be a hiring for a year. There has been a service under that hiring, and a dispensation with the week's service by the master. There was, at all events, a day's service under the yearly hiring; and what took place between the master and servant on that day may be considered as a dispensation with the week's service.

ABBOTT C. J. I think the conclusion drawn by the sessions was right. I agree that originally there was a contract operating as a hiring for a year, but the service under it was a service commencing a week after *Martinmas*. It is stated in the case that the pauper was hired three weeks before, but that he was to go into the service a week after *Martinmas*. There is nothing to shew that

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the service was intended to commence sooner. Assuming that there was a hiring for a year, to commence a week after *Martimas*, it is quite clear that there has not been a year's service. Then has the master dispensed with the service for the last week, or was the original contract rescinded? It appears, that on the same day on which the pauper arrived at his master's house, the latter said to him, "It is not the custom to hire servants in this parish for more than fifty-one weeks, which I forgot to mention to you at the time I hired you at *Bingham* statutes; and, therefore, if you have no objection, I must hire you afresh for fifty-one weeks, and give you another shilling for earnest;" when the pauper accepted of such earnest. I consider that to have been a dissolution of the original contract and a substitution of another. If this amounted to a fraud (although I have great difficulty in saying what is a fraudulent contract in this respect) the sessions ought to have found fraud. They have not done so. I, perhaps, should not have interfered to set aside the decision of the sessions if they had drawn a different conclusion, but I should not have been so well satisfied with it.

BAYLEY J. I think this was a point for the decision of the sessions, and I wish that the justices at sessions would understand that it is their duty to determine questions of fact, and not to send them to this Court for decision. They thereby put the parties to unnecessary expence. I agree that there may be a dispensation with the service at any period of the year, but whether there was so or not, was a question of fact which ought to have been determined by the sessions. I cannot say that they have improperly said there was not. Had they

they found that there was a contract of hiring under which the service was to commence at *Martinmas*, and that the servant by leave went to the master's service a week later, the court might have come to a different conclusion. So if there was originally a contract for a year, that might be dissolved. Whether it was so dissolved or not, was a question for the sessions. If this was a fraudulent agreement, the sessions ought to have found the fact of fraud. The question in this case was for the sessions, and I cannot say that their determination is wrong.

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HOLROYD and LITLEDALE J. concurred.

Order of sessions confirmed.

The KING against The Churchwardens and
Overseers of the Parish of Stow.

Saturday,
May 7th.

JOSEPH ASHTON, Ann his wife, and their three children, were removed by an order of two justices, from the township of *Stourton* by *Stow*, in the county of *Lincoln*, to the parish of *Stow* in the same county. Upon appeal, the sessions quashed the order subject to the opinion of this Court on the following case. The pauper, three weeks after *May-day* 1820, took a house and land in the appellant parish, at the rent of 15*l.* for one year, from the preceding *May-day* to *May-day* 1821. And at *May-day* 1821, he took the same again

hiring until six months after the second hiring, and paid the rent during the whole period, calculated from *May-day* 1820: Held, that he thereby gained a settlement in *S.*, for that the occupation under the different hirings might be connected so as to make an occupation for one whole year within the meaning of the 59 G. 3. c. 50.

A pauper, three weeks after *May-day* 1820, hired a house and land in the parish of *S.* for a year from the preceding *May-day*, at the rent of 15*l.*, and at the expiration of that time hired it again for another year at the same rent. He occupied the premises from the time of the first

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at the same rent for the year then ensuing. The pauper resided in the house, and occupied the land from the time he first hired the same till five months after *May-day* 1821, and paid the whole rent during the time he so occupied the said house and land.

Balguy and *Hildyard* in support of the order of sessions. The question turns upon the 59 G. 3. c. 50., by which it was enacted, "that after the passing of that act, no person should obtain a settlement by renting a tenement, unless it should be a house or land *bonâ fide* hired by such person, at and for the sum of 10*l.* a year at the least, for the *term of one whole year*, nor unless such house should be held, and such land occupied, and the rent for the same actually paid for the *term of one whole year* at the least." In this case the house and land were hired for the term of a whole year, and the rent was paid, but they were not occupied for the term of one whole year. There was an occupation for a year under two separate terms, but such occupation cannot be connected so as to satisfy the words of the act. It is true, that services under various hirings have been held sufficient to gain a settlement under the 8 & 9 W. 3. c. 30. s. 4., but several learned judges have expressed an opinion, that the statute had been improperly construed, although they felt bound to adhere to former decisions, *Rex v. Aynhoe* (a), *Rex v. Fillongley*. (b)

N. R. Clarke and *Amos* contra. The word *term* in this statute is not used in a technical sense, but means *period*; and if so, there is no doubt that the pauper

(a) 2 *Boul.* 253. pl. 317.(b) 1 *B. & A.* 319.

gained

gained a settlement in *Stow*. In *Rex v. North Colling-*
ham (c), the Court held that the statute was satisfied by
 the uniting for a year several tenements taken at different
 times, provided the pauper held them together during
 a whole year. If the occupation of different tenements
 under separate yearly hirings will suffice, surely it is
 sufficient if the pauper occupies the same tenement under
 different yearly hirings. The statute should be con-
 strued strictly, and in favor of the settlement; for the
 right to be irremovable is not given by statute, but is
 indigenous, and a relict of still greater rights given by
 the common law.

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ABBOTT C. J. I am of opinion, that the sessions have
 in this case mistaken the law. All that the act in
 question requires for the obtaining a settlement has been
 complied with. There has been a hiring of a house
 and land for a whole year, at a rent exceeding 10*l.*, and
 there has been a bonâ fide occupation and payment of
 rent for more than a year. That satisfies the whole of
 the act. It has been contended, that the legislature
 must have meant the hiring, occupation, and payment
 to be for the same year. If that had been their inten-
 tion, it would have been easy to say that the occupation
 and payment should be for *such* term. But as the words
 of the statute have been complied with, we cannot say
 that a settlement has not been gained, on the ground of
 some supposed intention of the legislature.

BAYLEY J. Considering the state of the law before
 the act in question passed, the words of that act, and
 the decision of this Court in *Rex v. North Collingham*, I

(a) 1 B. & C. 578.

think

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think we are bound to say that a settlement was gained in *Stow*. Before the passing of the act it was not necessary that a tenement should be hired for any specific period, the mere occupation for forty days of one or more tenements, together of the annual value of 10*l.*, sufficed. Then came the 59 G. 3. c. 50., requiring that the tenement should consist of a house or land, or both, that it should be hired for a year, occupied for a year, and that the rent should be paid for a year. All those requisites have been literally complied with, and the case of *Rex v. North Collingham* decided, that the taking need not be of one entire tenement; and I collect from that case, that the court did not think it necessary that, where there are several tenements, the holding of all should commence at one and the same time. And this is a reasonable construction of the act; for suppose a man to hire, at *Michaelmas*, land for a year at the rate of 9*l.*, and in like manner to hire at each quarter of the year land of the same value, and to occupy the whole and pay the rent for five years; unless the occupation under different hirings can be connected, it would be difficult to say that he ever occupied a tenement of 10*l.* per annum for one whole year. That surely would be a very unreasonable construction. I am therefore of opinion, that the occupation under the different hirings stated in this case may be connected, and that the pauper thereby gained a settlement in *Stow*.

HOLROYD J. I think that a settlement was gained by the renting a tenement stated in this case, connected with the other circumstances of occupation and payment of rent. We are required to put a construction on a restrictive act; but even if that were not so, I should think

think that the words of it have been complied with. If it had been intended that the occupation should be for the same term as the hiring, the legislature would probably have introduced the words, *for the said term*. It seems to me, that the words "nor unless," have been used in order to divide the sentence, and to exclude the construction now contended for on behalf of the appellants. The dicta as to the decisions on the 8 & 9 W. 3. c. 30. are not applicable to this case; that statute requires that the servant shall be hired for a year, and continue and abide in the *same* service for a whole year; there was, therefore, strong ground for supposing that the legislature meant the service which the party was hired to perform, viz. a yearly service. But the statute now before us does not require that the occupation shall be for the *same* term as the hiring.

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LITTLEDALE J. Upon the strict words of the act, I think that a settlement was gained in *Stow*, but at the same time I cannot but think the meaning of the legislature extremely doubtful.

Order of sessions quashed.

The KING *against* The Inhabitants of FINDON.

Saturday,
May 7th.

WILLIAM Steff, Mary his wife, and five children, were removed, by an order of two justices, from the parish of *Redgrave*, in the county of *Suffolk*, to the parish of *Findon*, in the county of *Sussex*; and upon appeal, the sessions confirmed the order, subject to the opinion of this Court upon the following case:

The forty days' residence necessary to confer a settlement by hiring and service must be within the compass of a year, but need not be under the same year's hiring.

The

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 ants of
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The pauper, *William Steff*, was hired by the Rev. *J. Ventris*, on the 2d of *November* 1807, for a year, served the whole of that period, and afterwards continued in Mr. *Ventris*'s service, under successive yearly hirings, until the 2d of *November* 1811, when the pauper was again hired by Mr. *Ventris* for another year. The pauper served his master at the parish of *St. Peter's in the East*, in the city of *Oxford*, from the said 2d of *November* 1811, until the 14th of *April* 1812. He then accompanied him to several other places till the 2d of *November* 1812, when he was again hired by Mr. *Ventris* for another year, and he travelled about with his master until the 20th of *December* 1812, on which day they arrived at *Findon*, in *Sussex*, the appellant parish, where they continued more than forty days; and afterwards he accompanied his master to the said parish of *St. Peter's in the East*, in the city of *Oxford*, where they continued from the 25th of *February* up to the 2d of *April* 1813, a space of thirty-eight days, and on the 2d of *April* 1813, left *Oxford* for *Beeding*, where they continued until the 2d of *May* following (thirty days), when they parted by mutual consent.

Nolan and *B. Andrews*, in support of the order of sessions. The last settlement gained by the pauper was at *Findon*. He there served forty days under the last year's hiring. On the other side, it must be contended that he gained a subsequent settlement in *Oxford* by serving there for thirty-eight days. But that will not suffice, unless the Court decide that forty days' residence within the compass of a year is sufficient, although under different hirings. *Rex v. Denham* (a) decided that the forty

(a) 1 M. & S. 221.

days'

days' residence must be within the compass of a year, but not that they may be under two different hirings.

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ants of
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Courthorpe (with whom were *Storks* and *Dover*) contra. This case is free from all doubt. On the 2d of *April* 1813 the pauper left *Oxford*, having resided there forty days within the compass of a year, and part of that service was under a yearly hiring. At that time, therefore, he clearly was settled at *Oxford*; and as he never afterwards returned to *Findon*, he cannot now have a settlement there.

ABBOTT C. J. The settlement of the pauper is clearly at *Oxford*; he was undoubtedly settled there on the 2d of *April* 1813, having resided there more than forty days within the last year of his service, and gained no subsequent settlement. It is not necessary that the whole of the residence should be under the last year's hiring.

BAYLEY J. I think this point was in effect decided in *Rex v. Denham* and *Rex v. Flambro*', which was before the court in 1819. It has never been decided that the forty days' residence must be under the last year's hiring.

HOLROYD and LITLEDALE Js. concurred.

Order of sessions quashed.

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The KING *against* The Inhabitants of CHILLESFORD.

The KING *against* The Inhabitants of WINSLOW.

An infant pauper may gain a settlement by hiring and service with his father.

IN the first of these cases, upon an appeal against an order of justices for the removal of *John Bye*, *Sarah* his wife, and four children, from the parish of *Blythburgh* to the parish of *Chillesford* in the county of *Norfolk*, the court of quarter sessions confirmed the order, subject to the opinion of this Court on the following case :

W. Bye, the pauper's father, being a married man, and settled in *Chillesford* himself, let himself to *Mr. Taylor* of *Blythburgh* better than fourteen years ago, as a shepherd. He was to have for the first year 40s. for wages, ten coombs of wheat and two of barley, produced on the farm, the going of thirty breeding ewes worth 10*l.* a year, and a cottage in *Blythburgh*, rent free, worth three guineas a year. *W. Bye* continued with *Mr. Taylor* for fourteen years upon the same terms. The ewes were *W. Bye's*, and fed with *Mr. Taylor's* sheep, and went in the morning in the sheep walk, and in the the afternoon on the layers, and in the winter on the turnips which were not drawn, but a certain portion of the turnip field was hurdled off, and the sheep then fed upon the turnips ; but during winter, when from frost or snow it was necessary, they were fed with hay, though for several seasons the weather being open, there was no occasion to feed them with hay. If *W. Bye* had not had the

the cottage he would have had more wages, and it was convenient for him as a shepherd, as it was on the spot.

W. Bye hired every year one or two pages, over whom *Mr. Taylor* had no control ; and about nine years ago, when one *Jarvis* one of the pages was to leave, *W. Bye* about a week before *Old Midsummer*, agreed with his son, the pauper, who was at that time nineteen years of age and unemancipated, to serve him for a year, from *Old Michaelmas* to *Old Michaelmas*, in *Jarvis's* place, at the same wages, 8*l.* a year, which time the pauper served, and slept in *Blythburgh*, being then unmarried, in his father's house.

In *Rex v. Winslow*, upon an appeal against an order of two justices for the removal of *Elizabeth Lane*, the wife of *T. Lane*, and their two children, from *Winslow, Bucks*, to *Beaulieu, Hants*, the court of quarter sessions quashed the order, subject to the opinion of this Court on the following case :

T. Lane, the husband of the pauper, when about fourteen years old, being then unemancipated, was hired by his father, who was a sawyer, residing at *Beaulieu*, but not having a settlement there, to assist him in his work as a sawyer. A contract was, in point of fact, made between them, whereby the son agreed to serve the father for a year at the wages of 2*l.* 10*s.*, his board and lodging being also provided by the father ; he served this year with his father in *Beaulieu*, and received his wages, and at the expiration of this contract, served his father for two successive years under new contracts, at increased wages. The question for the opinion of this Court was, whether, under this hiring and service in *Beaulieu*, a settlement was gained by *T. Lane*. The principal question discussed in these two cases was the same,

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same, viz. whether an infant could gain a settlement by a hiring and service with a parent. In the first there was another point, viz. whether the pauper's father acquired any settlement in *Blythburgh* by the going of the thirty sheep; but upon that point the Court gave no opinion. In *Rex v. Chillesford, Marryat and Dover* were heard in support of the order of sessions, and *Nolan* contra; and in *Rex v. Winslow, Scarlett, Dover, and Morris* were heard in support of the order of sessions, and *Bligh*, contra, was stopped by the Court.

In support of the orders of sessions it was urged, that there was not any case where a minor had been held to gain a settlement by serving a parent under a contract, unless the pauper had previously gained a settlement in his own right, or had become emancipated. Thus in *Chesham v. Missenden (a)*, a daughter who had a settlement of her own, and lived with her father, who was a poor man, as a hired servant for 10s. a year, besides what she could gain by her labor, was held to gain a settlement. There the pauper had a settlement of her own. So in *Rex v. Chertsey (b)*, the pauper had gained a settlement in her own right by hiring and service before she hired herself to her father, and it does not, in that case, appear whether the pauper was an infant. Here the pauper being an infant was not capable of entering into a contract of hiring with his father. The will of one was subject to the will of the other, and, therefore, a valid contract could not be made between them. The pauper was under a legal obligation to serve his father without any contract. In *Rex v. Beau-*

(a) 2 Bott. 178. pl. 237.

(b) 2 T. R. 57.

lien (a) it was held, that an invalided soldier who had leave of absence was incapable of gaining a settlement of hiring and service, not being *sui juris* to hire himself within the statute of 3 *W. & M. c. 11.*; and Lord *Ellenborough* there lays it down, that in order to gain a settlement a party must be *sui juris*, and have the faculty of disposing of his own service; and he further says, that a hiring and service is where the servant is able to give the master a *quid pro quo*. Now here the pauper already owed his services to his father; he could not, therefore, give the father any thing in return for his wages. [*Abbott C. J.* Suppose the son had first hired himself to another, and then hired himself to his father, would that be a good hiring?] In that case he would be emancipated and *sui juris* for the purpose of gaining a settlement under the poor laws. This is analogous to the case of sailors, during a voyage, contracting for additional wages; and such a contract has been held to be void, on the ground that there was no consideration for the ulterior pay promised to the mariners, they having sold all their services till the voyage should be completed. So, during the minority, a child owes all his services to his parent. Then to consider this question with reference to the policy of the law in giving a settlement by hiring and service, the statute of *William* confines the power of gaining a settlement by hiring and service to unmarried persons, not having child or children. The object of the legislature was, that a married person, or a person having lawful children, could not communicate to the children a settlement in the parish by entering into a contract of hiring and

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(a) 3 *M. & S.* 229.

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service ; and the Courts have put this construction upon the statute, for it has been held that a man may gain a settlement by hiring and service if his children are emancipated at the time from which the parent engages to serve. (a) Now it will defeat this object of the statute altogether if it be held that the father can by making a contract of hiring and service with his children enable them to gain a settlement in the parish where he resides. Besides, it will lead to great practical inconvenience, and to very nice and difficult questions, and to great contrariety of evidence whether there exists in fact a contract of hiring and service between the parent and his child.

On the other side it was urged that the argument in support of the order of sessions assumed, that there was the same relation between a parent and child as between a husband and wife, so that the one was legally incapacitated from making a contract with the other. That it was quite clear, that an infant might make a contract for his own benefit with a third person. It had been decided that he might bind himself apprentice, *Newbury v. St. Mary, Reading* (b), and *Rex v. Salton* (c), and if such an engagement with the parent was to be held void, it would in practice affect the interest and rights of an infinite number of persons who derive their right of freedom in corporations, as well as many other privileges from being bound to and serving their parent. It had been decided by the cases cited, that an emancipated child may gain a settlement by a contract of hiring and service with its parent. If emancipation be necessary to enable a child to contract with his parent as is assumed by the

(a) *Rex v. Cowhoneyburne*, 10 East, 88.

(b) 2 Bott. 363. pl. 425.

(c) 1 Bott. 613. pl. 886.

argument on the other side, it would follow, that as merely attaining the age of twenty-one years is not the ground upon which the child's ability to contract with the parent is founded, and as it does not, per se, emancipate, that a son who has attained that age, but who is not emancipated, cannot make a binding contract for service or any other purpose with his father, which is a proposition altogether untenable. If then an infant may, for his own benefit, bind himself an apprentice to a third person, and by consequence to his parent, it seems to follow as a fair inference, that for his own benefit he may enter into a contract of hiring and service with a third person; and if so, he may make a similar contract with his own parent. Then the relationship is not like that of husband and wife, inconsistent with such an agreement. Both father and son may derive many reciprocal advantages, as to instruction, remuneration, and actual service, from a contract for service which could not legally result from the mere relation of parent and child, and a contract which may be legally and morally beneficial to both, must be lawful for both to make. As to the argument, that this may lead to contradictory evidence at the sessions, and to much litigation there, it applies equally to all contracts of hiring, and certainly not less to hirings after emancipation than to those made before. It is not the difficulty of coming to a legal decision, but the consequences of the determination that should or can influence the opinion of this Court.

ABBOTT C. J. I am of opinion, that in each of these cases the pauper gained a settlement by hiring and service. It has been conceded, that if the pauper had

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been previously emancipated, he might have gained a settlement afterwards by hiring and service with his father. But emancipation does not confer any capacity to contract, and the objection is, that the son had not the power to contract with his father, although he might with a stranger. The contract of an infant made for his own benefit, according to general principles of law, is not void, but voidable only at the election of the infant. This differs from the case of the soldier which has been adverted to in argument; he is under the dominion of another, and owes all his services to the crown at all times, and a contract of hiring made by him is inconsistent with the duties he owes to the crown, and therefore void, but in this case the contract is not void but voidable only; and if an infant, therefore, may with the permission of his father enter into a contract with a third person, why may he not with his own father? and here, the father by taking him as his servant, gives his consent to the contract. There being no general rule of law declaring such a contract void, is there any thing in the settlement law to shew that a settlement cannot be gained under such a contract? It is said, if a settlement may be so gained, it may enable a father to give to his son a settlement in a parish where he could not derive one from him. But there are other cases of the same description. It has been said also, that our holding that a settlement can be so gained may cause great confusion in sessions' law, and occasion much litigation and difficult questions at the sessions. I cannot say that such may not be the case. Whenever such a case arises it will be the duty of the sessions to look narrowly at the facts, and to consider whether there really was any contract of hiring and service; and one mode
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of ascertaining that, will be to consider whether the father had any occupation for a hired servant, and if he had no employment for the son as a servant, the sessions may fairly conclude that there was no contract of hiring and service. In both the cases before the Court, there is every reason to suppose that there was a *bonâ fide* hiring and service; for in one of them, the pauper's father hired his son upon another servant's leaving him. In the other the father was a sawyer, and two persons are always required in that trade, and there were several successive contracts entered into between them at increased wages. It seems to me that there is fair ground to suppose, that in these cases the paupers were really and *bonâ fide* hired as servants, and therefore that a settlement was gained.

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BAYLEY J. This is the first time that this question has arisen; but it seems to me that the son was competent to contract with his father, and that all the legal consequences resulting from such a contract follow from the existence of the contract. It is clear that an infant may bind himself to a stranger. In that case the father may be supposed to concur, but it may be done without his concurrence. An infant may make a contract for his own benefit; he may, therefore, make a contract for hiring and service, for that will be beneficial to him. It will give him a right to sue for wages. If he does not perform his contract, although no action may lie against him, he will be liable to the statutable regulations applicable to masters and servants. Then the question arises, whether the relation of parent and child destroys the capacity to contract. It is clear that it does not do so in the case of emancipated children, or of natural children, or of step-children, *Rex v. St.*

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Peter's, Dorset. (a) And yet if a step-child is capable of contracting with his step-father, the same mischief results, as if his own father consented; the same observation applies to emancipated children. If there be only a pretended service, the court of quarter sessions ought to conclude that there was no contract of hiring, and to decide against a settlement; but if there be a bonâ fide contract, it produces new rights and new relations. It gives the father a new right of control, and the child a right to wages, which is beneficial to him; and it also gives to him a settlement in that parish, where he serves under the contract.

LITLEDALE J. There is by law a species of service due from a son or daughter to the parent, which, as to the latter, is the foundation of the action of seduction, and there it is not necessary to prove actual service; and if there be any species of service due by law from the child to the parent, why may not the obligation of serving the parent be extended by allowing him to hire the child at certain wages for a specific time. It is admitted that an infant may hire himself to a third person, but it is said, that being already under the control of the parent, and owing some services to the parent, the child cannot make a contract with him; but there is no reason why a child may not contract to render to a parent other services than those which are due in consequence of the relation of parent and child. That may be beneficial to the infant, and will at the same time also subject him to the statutable regulations applicable to master and servant. And if in point of

(a) *Burr. Sett. Cases*, 513.

law a child may hire himself, then the statute gives him a settlement resulting from the hiring and service. There may be some certain inconveniences resulting from our decision, but neither the common law nor the statute law say that such a contract shall not be binding. I, therefore, think, that in both these cases a settlement was gained. My Brother *Holroyd*, who has left the Court, desires me to say, that he concurs in this opinion.

Orders of sessions quashed.

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WARBURTON *against* STORR.

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DEBT on an agreement, whereby, after reciting that differences had existed between the parties, and that the plaintiff had commenced an action against the defendant, they "did agree with and to each other, that they the said plaintiff and defendant respectively should and would well and truly observe, perform, and keep the award, order, arbitrament, and final determination of C. S.," concerning the said action, to be made within a certain time. "And each of the said parties did thereby bind himself and his executors, &c. unto the other of them his executors, &c. in the penal sum of 100*l.* for the true and faithful observance and performance, on their respective parts, of the award and determination which should be made as aforesaid." The plaintiff then averred performance of the agreement, but that the defendant, before the expiration of the time for making the award, did hinder and prevent the said C. S. from making his award, according to the true intent and meaning of the said agreement, in this, to

Where two parties entered into an agreement (not under seal,) to refer a dispute to the arbitration of C. S., and bound themselves mutually in a penalty "for the true and faithful observance and performance" of the award to be made by C. S.: Held, that the penalty was incurred by a revocation of the submission.

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wit, that on, &c., at, &c., the defendant by a certain deed poll, sealed with his seal, did rescind, revoke, and make void all power and authority whatever given to the said *C. S.* by the said agreement, whereby an action hath accrued to the plaintiff to have and demand the said sum of 100*l.* in the agreement mentioned. Demurrer and joinder.

Campbell in support of the demurrer. This is an action of debt on simple contract, and the question for the Court is, whether the defendant has incurred the penalty in that contract. Now, although the agreement contains various stipulations, yet the penalty applies only to the non-performance of an award to be made. It must be admitted, that an implied promise not to revoke the submission arises out of the agreement, and that assumpsit would lie for the breach of it, but the plaintiff has thought fit to bring debt for the penalty. The words are, that the plaintiff and defendant respectively should and would well and truly “observe, perform, and keep the award, order, arbitrament, and final determination of *C. S.*” Where an arbitration bond is given containing in the usual form a condition that the parties shall “stand to and abide” the award; it has been held that the condition is broken by a revocation of the submission, but that if the words are merely “observe, perform, fulfil, and keep” the award, there the condition is not broken unless an award is made and not performed, *Vynior’s case*. (a) And in 5 *Ed. 4.* 3. b., cited in *Vynior’s case*, it is said, “If I am bound to stand to the award which *J. S.* shall make, I cannot

(a) 8 Co. 162. 3d resolution.

discharge that arbitrament, because I am bound to stand to his award, but if it be without obligation it is otherwise." The present agreement amounts to nothing more than a mutual promise to perform the award. In *Marsh v. Buteel* (a) there was a covenant not to prevent the arbitrators from making their award.

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Oldnall Russell contra. In 8 Co. 162. two reasons are given for the third resolution in *Vynior's* case, and each of them shews that the present defendant has incurred the penalty in the agreement of submission, 1st. He has broken the words of the agreement to "observe, perform, and keep" the award of C. S., which is the first reason assigned in *Vynior's* case. A distinction, indeed, is there taken, between "standing to and abiding" an award, and "observing, performing, and keeping" an award; but surely the words "observe and perform" are as comprehensive as "stand to and abide," and must in like manner operate to prevent a revocation of the submission. The second reason for that resolution was, that the obligor had, by his own act, made the condition of the bond, which was for his benefit, impossible to be performed, and by consequence it had become single. That doctrine is not confined to bonds with condition, for it has in many cases been held, that where a person by his own act puts it out of his power to perform his contract, that is in law a breach of it, *Mayne's* case (b), *Charnley v. Winstanley* (c), *Hotham v. East India Company* (d), *Waddington v. Bristow* (e), *King v. Joseph*. (f) The contract in this case has, therefore, been broken,

(a) 5 B. & A. 507.

(b) 5 Co. 21.

(c) 5 East, 286.

(d) Doug. 272.

(e) 2 B. & P. 452.

(f) 5 Taunt. 452.

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and the penalty attaches as a legal consequence of that breach.

Campbell, in reply. The words of the original clause of submission and the penal clause in this agreement are the same, "observe, perform, and keep;" and appear to have been intentionally used, in order that the penalty might not attach unless an award should be made and disregarded. *Charnley v. Winstanley* is the only case at all resembling the present; and there the word "abide" was introduced. The second reason in *Vynior's* case applies only where a bond has been executed, and, therefore, does not affect the present case; and the first reason is decisive in favor of the defendant.

Cur. adv. vult.

The judgment of the Court was now delivered by ABBOTT C. J. who (after stating the pleadings) proceeded as follows. The argument on behalf of the defendant was founded chiefly on the third resolution in *Vynior's* case; in that case, however, it is to be observed, that two reasons are given for the judgment. The one formal, arising out of the words of the condition, the other, which may be called the substantial reason, arising out of a well known and established rule of law, that if a party covenants to do a certain thing, and afterwards, by his own act, disables himself from performing it, that is in itself a breach of the covenant. This rule is so well established that authorities need not be cited in support of it. The third resolution in *Vynior's* case is thus: "By the countermand or revocation of the power of the arbitrator, the obligee shall take benefit of the bond, and that for two reasons; first, be-
cause

cause he has broken the words of the condition, which are, that he should stand to and abide, &c. the rule, order, &c.; and when he countermands the authority of the arbitrator, he doth not stand to and abide, &c., which words were put in such conditions, to the intent that there should be no countermand, but that an end should be made by the arbitrator of the controversy, and that the power of the arbitrator should continue till he had made an award: and when the award is made, then there are words to compel the parties to perform it; viz. ‘observe, perform, fulfil, and keep’ the rule, order, &c., and this form was invented by prudent antiquity, and it is good to follow, in such cases, the ancient forms and precedents, which are full of knowledge and wisdom.” The words “stand to and abide” are not found in the present contract; in that respect the plaintiff has departed from the ancient form, and has shewn the truth of Lord *Coke’s* observation as to following ancient forms, for by such departure he has occasioned this litigation. The distinction drawn between the different words above cited, is, I must confess, extremely nice and subtle, nor can I discover any real and substantial difference between them. But the second reason in *Vynior’s* case is clearly applicable to the present, viz. that as the obligor had by his own act made the condition of the bond impossible to be performed, the bond had become single. Apply that to a covenant, and it falls precisely within the rule which I have before mentioned. So here, the defendant having agreed under a penalty to perform an award, and having, by a revocation of the submission, disabled himself from doing so, he has broken his agreement, and thereby subjected himself to an action for the penalty. For these reasons our judgment must be for the plaintiff.

Judgment for the plaintiff.

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GRAY and Another *against* Cox and Others.

Where the plaintiff in assumpsit alleged that in consideration that he would buy a quantity of sheathing copper of the defendant at a certain price, defendant undertook that it should be good, sound, substantial, and serviceable copper: Held, that this warranty was not proved by shewing a purchase of copper sheathing at the ordinary market price, no express warranty having been given.

Quære, Whether such evidence would have been sufficient to prove an allegation, that the defendants promised that the article sold should be reasonably fit for sheathing copper.

ASSUMPSIT. The first count of the declaration stated, that, in consideration that the plaintiffs, at the request of the defendants, had agreed to purchase of the defendants a quantity of goods and merchandize, to wit, 300 plates of copper sheathing, of a certain weight per foot, to wit, &c., at and for a certain price agreed upon between them, to wit, &c., the defendants undertook to furnish the plaintiffs with such goods and merchandize as aforesaid, of a good, sound, substantial, and serviceable quality. Averment, that the plaintiffs, relying upon that undertaking, did buy the copper at the price aforesaid, but that the defendants did not furnish such goods as aforesaid of a good, sound, substantial, or serviceable quality, but on the contrary did, instead thereof, supply the plaintiffs with certain plates of copper sheathing, of a very bad, unsound, and worthless quality, by means whereof the plaintiffs having affixed and fastened the said copper plates to a certain ship or vessel of them (plaintiffs) were forced to lay out a large sum of money in taking them off again and procuring other sheathing-plates, and affixing them to the said ship. The second count varied in some immaterial respects from the first, but had a warranty in the same words as before. There were several other counts, without any material variation in the statement of the warranty. Plea, general issue. At the trial before *Abbott C. J.*, at the *London* sittings after *Hilary* term 1824, it was proved by a bill of parcels and receipt given

given by the defendants, that in *May* 1821 they had furnished to the plaintiffs for the ship *Coventry* a quantity of what they called "Sheathing Copper," and the price charged was the market price of the day for that article. No express warranty was proved; the vessel was coppered by shipwrights employed by the plaintiffs. The vessel made one voyage to *Demerara*, and returned in *January* 1822, when great part of the copper was found to be full of holes, and unfit for further use; it was diminished in weight more than usually happens in the same space of time. Several witnesses proved that copper sheathing generally lasted four or five years, but admitted that the article in question was copper, and appeared good when put on the ship, and that no defect could be discovered by inspection of the article. The defendants were not the manufacturers of the copper, but procured it from the manufacturer, and resold it at a profit of 5 per cent. It was admitted, that no imputation of fraud could be cast upon the defendants, and that it must be considered that they were ignorant of the defective quality of the copper. Upon this evidence it was urged, that the plaintiffs ought to be nonsuited, no warranty of the copper having been proved. The Lord Chief Justice was of opinion, that the defendants having sold the copper to be applied to a specific purpose, and having received for it the market price of the day, must in law be considered as warranting it to be reasonably fit for that purpose; and under this direction the plaintiffs obtained a verdict. In *Easter* term a rule nisi for a new trial was obtained, against which, in *Michaelmas* term, *Scarlett* and *J. L. Adolphus* shewed cause, and *Gurney* and *Campbell* supported the rule, and by the direction of the Court the case was again argued in this

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1825. this term by *J. L. Adolphus* for the plaintiffs, and *Campbell* for the defendants.

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Arguments for the plaintiffs. There are two grounds on which the plaintiffs are entitled to retain the verdict found for them by the jury. First, the article supplied by the defendants was different from that which was ordered by the plaintiffs, and for which they paid. Secondly, on the contract proved, a warranty arose by implication, that the copper should be reasonably fit for the purpose for which it was supplied. The contract, as stated, was proved by the bill of parcels, and the receipt given to the plaintiffs on payment of the price. It appeared, therefore, that a certain article was ordered at a certain price, and of a certain weight, whence persons conversant with the trade must have known the nature of the article to be supplied. The weight and the price were those of sound and serviceable copper; the defendants, therefore, must in law be considered as having sold this for sound and serviceable copper, but upon the evidence it is plain it was not so, and that the article furnished was altogether different from that which was ordered, *Jones v. Bowden* (a), in which case *Heath J.* cited and relied upon a case (probably *Weall v. King* (b), although the report does not notice this point,) tried before himself, which was an action on the sale of some sheep sold as stock; the evidence was that by the custom of the trade, *stock* were understood to be sheep that were sound, and that learned Judge told the jury that it amounted to an implied warranty that they were sound, and that direction was afterwards

(a) 4 Tawnt. 847.

(b) 12 East, 452.

sanctioned

sanctioned by this Court. In *Yeats v. Pim* (a), Gibbs C. J. says, "Where a party undertakes that he will supply goods of a certain description, he must execute his engagement accordingly." In this case it does not appear that the whole of the article furnished was copper; when the vessel returned from her voyage, the sheathing had fallen into holes, and had lost greatly in weight; copper usually lasts much longer, it may therefore be presumed, that the whole of the sheathing was not copper; and if so, *Bridge v. Wain* (b) is expressly in point for the plaintiff. Secondly, there was an implied warranty, that the copper was reasonably fit for the purpose to which it was to be applied. The maxim, *caveat emptor*, will be set up as an answer to this, but it is inapplicable. In 1 *Inst.* 102 a. it is said, "that by the civil law every man is bound to warrant the thing that he selleth or conveyeth, albeit there be no express warranty; but the common law bindeth him not unless there be a warranty either in deed or in law, for *caveat emptor*." But here a warranty is to be inferred, and by comparing *Chandelor v. Lopus* (c) with *Pasley v. Freeman* (d), it will be found that the old law respecting deceit has been much relaxed in favor of the party deceived, particularly since the action of *assumpsit* has been in common use. In *Fisher v. Samuda* (e), Lord *Ellenborough* expressed an opinion that a purchaser might call upon a seller to take back his goods, if they were unfit for the purpose for which they were intended, provided the objection were made as soon as the defect was discovered, which was done in the present case;

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(a) 2 *Marsh.* 141.(b) 1 *Stark. N. P. C.* 504.(c) *Cro. Jac.* 4.(d) 3 *T. R.* 51.(e) 1 *Campb.* 190.

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and in *Gardiner v. Gray* (a) that learned Judge says, that without any particular warranty it is an implied term in every contract, that the purchaser shall have a *saleable* article answering the description in the contract; and again, in *Bluett v. Osborne* (b), "A person who sells impliedly warrants that the thing sold shall answer the purpose for which it is sold." *Laing v. Fidgeon* (c) shews that the present case is still more favorable for the plaintiffs, the contract being for manufactured goods. *Prosser v. Hooper* (d) is not an authority on the other side, for there the undertaking of the parties collected from their acts was held sufficient to control the words of the contract. *Parkinson v. Lee* (e) is the only authority on which the defendants can rely, but there it would have been sufficient (if no warranty is to be implied) for the judges to have said, there was no warranty and no fraud, but they entered into the whole question of intention, and that was made a main ground of the judgment. It makes no difference that the defendants were not themselves the manufacturers of the copper, they were so in effect, for the real manufacturers were their agents in that respect. Neither can it be urged that the plaintiffs had an opportunity of inspecting the article: an ordinary consumer of such manufactured goods cannot be supposed capable of forming a judgment as to the quality, but the regular dealer in the commodity ought to have such knowledge.

Arguments for the defendants. It is very material to consider the form of the declaration in this case. It is

(a) 4 *Campb.* 144.(c) 6 *Taunt.* 108.(e) 2 *East*, 314.(b) 1 *Stark. N. P. C.* 384.(d) 1 *B. M.* 106.

in *assumpsit*, not deceit; it is not framed upon the bill of parcels, nor upon the receipt. If the declaration had alleged that the defendant undertook that the article was copper, or copper-sheathing, that would have been proved by the receipt or the bill of parcels; but then, in order to make out a breach, the evidence must have been that it was not copper, or not copper-sheathing, that would pass for such in the market. Had that been established, the case would certainly have been within *Bridge v. Wain*. But this declaration is very different, it avers a promise that the copper should be "of a good, sound, substantial, and serviceable quality." Each count is nearly in the same words, each contains a warranty against secret defects. If this averment was proved by the evidence, it must be admitted that the defendants have no sufficient defence, whatever pains they may have taken to ensure the goodness of the article. But it was not proved, there was not any evidence except the bill of parcels and receipt, and they certainly shewed no express contract that the copper should be of any particular description. The witnesses admitted that the article supplied was copper, and that before the voyage there was no appearance of any defect; it is, therefore, clear that the defect was secret. In all simple contracts of sale, *caveat emptor* applies. In the ordinary case of the sale of a horse, if there be no express warranty, none can be implied, the price or the purpose to which he is to be applied will not raise one. Every thing is bought for some particular purpose; and as to the price, that can make no more difference in this case than in every other where an article is purchased at the usual market price, which certainly does not raise an implied warranty. Fraud undoubtedly is an exception,

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ception, but it is conceded that no fraud existed in this case. All the cases, when examined, are in favor of the defendants. In *Yeats v. Pim* there was an express warranty: the custom of the trade was set up as an answer, but held insufficient. In *Bridge v. Wain* the plaintiff recovered on a count stating that he contracted for scarlet cuttings, and that the article supplied was not scarlet cuttings. In *Fisher v. Samuda* no question arose as to the extent of the warranty, and there the goods were supplied for exportation, and were never seen by the plaintiff, which appears also to have been the case in *Laing v. Fidgeon*. *Gardiner v. Gray* is also an authority in favor of the defendants, for there it was held that there was no implied warranty that the goods should be equal to the sample exhibited, but the plaintiff recovered, because the article supplied was not that which was described in the contract. The passage cited from *Bluett v. Osborne* is *prima facie* in favor of the plaintiffs, but Lord *Ellenborough* immediately afterwards says, "In this case the bowsprit was apparently good, and the defendants had an opportunity of inspecting it. No fraud is complained of, but the bowsprit turned out to be defective upon cutting it up. I think the plaintiff is not liable on account of the subsequent failure." Here no fraud is imputed, the copper was apparently good, and the plaintiffs had an opportunity of inspecting it. The defendants, therefore, are not liable on account of the subsequent failure. As to *Weall v. King* the declaration averred a contract for stock sheep, and the whole question was upon the custom, as explaining the meaning of the contract. Here the article supplied was sheathing-copper, and there was no evidence that the customary meaning of sheathing-copper was "copper

that would last five years." Then *Parkinson v. Lee* is expressly in point; the second count there averred a promise to supply good, sound, and merchantable hops. The evidence was, that the plaintiff paid for them a fair market price for merchantable hops, but no express warranty being proved, it was held that the defendant was not responsible for a latent defect in the article.

Cur. adv. vult.

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The judgment of the Court was now delivered by

ABBOTT C. J., who (after stating the pleadings) proceeded as follows. At the trial of this cause no evidence of an express warranty was given. The proof was that the plaintiffs ordered a certain quantity of copper sheathing, and paid for it a fair market price. The plates were affixed to the vessel by a shipwright, who did not then discover any defect in them, nor could any defect be discovered by inspection. The defendants were copper merchants, not manufacturers. It appeared also that on the return of the vessel from her first voyage after the copper was put on, many of the plates were corroded by the salt water, and full of holes, so as to make it necessary to supply them by new ones. At the trial it occurred to me, that if a person sold a commodity for a particular purpose, he must be understood to warrant it reasonably fit and proper for such purpose. I am still strongly inclined to adhere to that opinion, but some of my learned brothers think differently. Supposing, however, my opinion to be correct, still the plaintiffs have not declared on a warranty or promise of that nature, but upon a general warranty; and we are all of opinion that such a general warranty

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does not arise, nor can be implied in law from such a contract of sale as the present. For this reason we think that the opinion expressed by me at *Nisi Prius* was incorrect, and that the rule for a new trial must be made absolute.

Rule absolute.

Monday,
May 16th.

LAILLER *against* FOSTER.

It is not necessary that there should be fifteen days between the teste and return of a writ of error.

ALDERSON moved for a rule to quash a writ of error, because there were only twelve days between the teste and return. The Court at first doubted whether they could quash a writ issuing out of Chancery, but upon the authority of *Lloyd v. Scutt* (a) granted the rule.

Wightman shewed cause and contended that it was not necessary that 15 days should intervene between the teste and return. Such a writ is not the commencement of a suit, and is tested on the day when it issues, *Hill v. Tebb* (b); and the practice has been not to pass over more than one return between the teste and the return of the writ.

Per Curiam. (After consulting the Master.) There certainly is a distinction between writs of error, and those which are the commencement of a suit, and as the

(a) 1 *Doug.* 350.

(b) 1 *N. Rep.* 298. 2 *Tidd*, 1171.

usual

usual course of practice has been followed in this case,
we think the writ ought not to be quashed. (a)

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Rule discharged.

LAIDLER
against
FOSTER.

(a) In *Tidd's Practice*, p. 1171. 6th ed., it is said, that there must be fifteen days between the teste and return of writs of error, but no authority is cited in support of that opinion.

LYTTLETON *against* Cross and Another, Executors of LUSH. Monday,
May 16th.

DECLARATION in covenant against the defendants as executors, they pleaded plene administravit, and a retainer by one of the defendants with the assent of the other for a debt due to himself. At the assizes the defendants pleaded a plea puis darrein continuance, to which the plaintiff replied, and to that replication the defendants demurred, and on that demurrer judgment was given for the defendants. (a) A rule was afterwards obtained for taxing the costs of the whole suit for the defendants.

Covenant against executors. Plea, plene administravit and a retainer. At the trial, the defendants pleaded a plea puis darrein continuance, to which the plaintiff replied, and defendants demurred to the replication. Judgment for the defendants on the demurrer: Held, that they were entitled to the costs incurred after the plea puis darrein continuance, but not to the costs of the whole cause.

R. Bayly shewed cause. At all events the defendants cannot claim any costs except those incurred after the plea puis darrein continuance, but they are not entitled to any costs. The claim depends upon the 8 & 9 W. 3. c. 11. s. 2. (b) But that was made to prevent frivolous and vexatious

(a) Vide 3 B. & C. 317.

(b) And forasmuch as for want of a sufficient provision by law for the payment of costs of suit, divers evil disposed persons are encouraged to bring frivolous and vexatious actions, and others to neglect the du payment of their debts, "Be it further enacted, that if any person or persons

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vexatious suits. Surely this cannot be called a frivolous or vexatious suit, for at the time when the cause was commenced the plaintiff had a good right of action, and that was defeated by an act subsequently done by the defendants, which they pleaded puis darrein continuance. There is not any case expressly in point; but in *Toms v. Lloyd* (a) the construction now contended for was put upon the statute.

Campbell and Jeremy contra. The decision in *Toms v. Lloyd* does not affect the present case. That proceeded on the ground that the merits of the case were not determined by a judgment on demurrer to a plea in abatement, and that rule was followed in *Garland v. Exton*. (b) The plaintiff might in this case, after the plea puis darrein continuance, have taken judgment of assets, quando acciderint. In that case the plaintiff would not have been liable to pay any costs, but as he chose to proceed after the plea puis darrein continuance, his situation is like that of a person proceeding after payment of money into court. Under such circumstances if the plaintiff eventually fails, he is liable to all the costs, *Jeffs v. Smith*. (c) And this is the fair con-

shall commence or prosecute in any court of record, any action, plaint, or suit wherein upon any demurrer either by plaintiff or defendant, judgment shall be given by the Court against such plaintiff; or if at any time after judgment given for the defendant in any such action, plaint, or suit, the plaintiff shall sue any writ of error to annul the said judgment, and the said judgment shall be afterwards affirmed to be good, or the said writ of error shall be discontinued, or the plaintiff shall be nonsuit therein; the defendant in every such action, plaint, suit, or writ of error, shall have judgment to recover his costs against every such plaintiff, and have execution for the same by *capias ad satisfaciendum*, *feri facias*, or *elegit*.

(a) 12 Mod. 195. (b) 2 Ld. Raym. 992. (c) 4 Taunt. 196.

struction

straction of the words of the statute, which are, that if judgment on demurrer is given for the defendant, he shall have judgment to recover his costs, which must mean costs generally, and cannot be confined to the costs of any particular part of the suit.

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 against
 CROSS.

BAYLEY J. I am of opinion that the defendants are entitled to *their costs*, but that those words mean the costs incurred subsequent to the time of putting in the plea puis darrein continuance. The words of the enacting clause are not confined to persons *bringing* frivolous actions; and it is to be remembered that an action well brought may afterwards be frivolously and vexatiously carried on. Here, when the plea puis darrein continuance was pleaded, the plaintiff had the option of submitting or proceeding with the action. He chose to proceed, and having put in a replication bad in law, certain costs were by his act incurred. For those costs I think he is liable, but not for the costs of the former proceedings, inasmuch as the action appears to have been at first well founded.

HOLROYD J. I think that the defendants are entitled to costs, but not all costs of the action, for it was rightfully commenced. It appears to me that, upon the true construction of the act, the costs are to be paid by the plaintiff so far only as the action has been wrongfully prosecuted, viz. since the plea puis darrein continuance was pleaded.

Rule absolute.

1825.

Monday,
May 16th.

MORTIMER and Others, Assignees of MERRIMAN,
a Bankrupt, against FLEEMING.

A. agreed with *B.* for the absolute purchase of a ship for the price of 7850*l.*, but *A.* being unable to pay the purchase money, it was stipulated that the sale and transfer of the ship should be deferred until he could

pay the purchase money, in the manner thereafter mentioned, and that in the mean time *B.* should continue the legal owner of the ship, and should be responsible for her outfit, &c., so as to enable the ship to proceed on her intended voyage to *India* and back, under the command of *A.*, and on his account. Covenants by *A.* to pay to *B.* all monies, costs, and charges which, since the completion of the last voyage, had been paid by him on account of the outfit, or costs of supplying the ship and the premiums of insurance until the transfer was made, and also, that *A.* should pay all port charges and disbursements subsequent to the sailing of the ship on her then intended voyage, and to pay the purchase money in manner following; first, by two instalments of 500*l.* each, the further sum of 4000*l.* by bills of lading and invoices for goods shipped on board the ship for her then intended voyage, and which goods were to be made deliverable to *B.* or his assigns, to the intent that he might dispose of the same in *India*, and invest the proceeds in other goods to be shipped on board the ship, and to be made deliverable to *B.* in *London*, or invest the same in bills, and then the net amount of such goods or bills to be in further payment of the purchase money. Covenant by *B.*, that at the expiration of three months next ensuing the arrival and report inwards of the ship in *London* from her then intended voyage, and upon *A.*'s paying the sum thereby intended to be secured, and performing the covenants therein contained, that he (*B.*) would transfer to him the ship. At the time of the execution of the agreement the ship was in the port of *London*, where she was registered. There was no indorsement of the agreement on the certificate of the registry; but in pursuance of the agreement *A.* had possession, and fully loaded her on his own account, and sailed on the voyage to *India*. *A.* paid to *B.* the two instalments, and delivered to him a bill of lading of goods valued in the invoice at 4000*l.*, which were consigned by *B.* to merchants at *Calcutta*. *A.* left those goods at *Madras*, and then proceeded to *Calcutta*, where he relinquished the command. *A.* became bankrupt, and did not complete the purchase of the ship, nor pay the residue of the purchase money: Held, first, that an executory contract for the sale of a ship was within the statute 34 G. 3. c. 68. s. 15., and, therefore, that the contract for the sale of the ship was void for want of an indorsement of the agreement on the certificate of registry.

Held, secondly, in assumpsit by the assignees of *A.* against *B.*, that the true principle of taking the account between the parties was to charge the assignees for the sum for which the ship might have been let or chartered for such a voyage, with such expenditure (if any) as properly belonged to the freighter of the ship, and such further expence and loss, to any, as *B.* had been put to by the misconduct of *A.* in the management of the ship, and if allow to the assignees of *A.* the sums received by *B.* in respect of the transaction.

by

by the defendant for the use of the plaintiffs as assignees, &c. &c. Plea, the general issue. The cause was tried at the *London* sittings after *Michaelmas* term, before *Abbott* C.J., when a verdict was found for the plaintiffs, subject to the opinion of this Court on the following case:

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against
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A commission of bankrupt duly issued against the bankrupt, bearing date *January 25*, 1820, founded on an act of bankruptcy committed the 17th day of *December* 1819, and under the commission the plaintiffs were duly chosen assignees of the bankrupt. The defendant was the sole owner of the ship *Ganges*, registered in the port of *London*. On the 27th of *May* 1817, the defendant and the bankrupt duly executed articles of agreement, reciting that after the arrival of the *Ganges* in the port of *London* from her last voyage, and on her completing such voyage, *Merriman*, who was master of the ship, contracted and agreed with the defendant, sole owner thereof, for the absolute purchase of the ship and her appurtenances, in the state and condition the same were in on the completion of the said voyage, at or for the price or sum of 7350*l.* sterling; but that *Merriman* then being unable to pay the whole of the purchase-money, it was further agreed between them, that *the sale and transfer of the ship and her appurtenances unto Merriman should be deferred until* he could and should pay the purchase-money in manner thereafter mentioned; and that in the meantime, for the benefit and accommodation of him, *Merriman*, he, *Fleeming*, should be and continue interested in and entitled to the said ship and her appurtenances as legal owner thereof, and should be responsible also for her outfit, manning, tackle, apparelling,

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parelling, furnishing, providing, and other supplies, and for all her costs, charges, and expences, and the premiums and costs also of the insurances on the ship and her freight, so as to enable the ship to proceed on her then intended voyage to *India* and back under the command of him, *Merriman*; but upon his account, nevertheless, and on his entering into and performing the covenants thereafter contained on the part of him, his heirs, executors, &c. to be performed and kept, in which case he, *Merriman*, should be entitled unto and should receive to his own use, all the gains, profits, and earnings of the said ship, for and during her then intended voyage to *India* and back; he, *Merriman*, covenanting to be at the same time responsible for all losses and damages which might arise or result from, or for or in respect of the said ship on her intended voyage and adventure. The articles of agreement, then after reciting the certificate of registry of the ship, contained covenants by *Merriman* to pay to *Fleeming*, all sums of money, costs, charges, and expences, which, since the completion of the ship's last voyaye, had been or thereafter should be paid or expended by him, *Fleeming*, or for the payment whereof he might be responsible in respect of, or for or on account of the ship, or the outfit, manning, and otherwise supplying the same, and the premiums and costs of insurance on the ship and her freight, or otherwise concerning the said ship, down to and until such transfer and conveyance as was thereafter mentioned. There then followed a covenant by *Merriman*, to pay all port charges, disbursements, and expenditures requisite to be paid on account of the ship, subsequent to the day of her sailing from *Gravesend* on her intended voyage; and that to save *Fleeming* harmless in

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with him, *Fleeming*, as collateral securities. Covenants by *Fleeming* that, at the expiration of the said term of three calendar months next ensuing the arrival and report inward of the ship in the port of *London* from her said intended voyage, and on *Merriman's* paying all the sums thereinbefore mentioned, and thereby intended to be secured, and performing the covenants thereinbefore contained, that he would bargain, grant, sell, assign, transfer, and set over unto him, *Merriman*, the ship or vessel, with all masts, sails, yards, &c. to the said ship belonging, to have and to hold to him, *Merriman*, absolutely for ever, free and clear from all debts, charges, &c.; and further, on *Merriman's* so paying the monies and performing the covenants aforesaid, he, *Merriman*, should be entitled to take and receive to his own use all the net and clear gains and profits which had been and should be made and earned by or in respect of or upon account of the said ship, and the employment, voyages, services, operations, and transactions thereof, from and subsequently to such termination and conclusion as aforesaid of the said last voyage down to, and until such transfer and conveyance of the said ship and her appurtenances. At the time of the execution of the articles of agreement the ship was lying at *Gravesend* loaded. *No indorsement of the agreement or of any transfer or sale of the ship was made upon the ship's register.* On the 30th of *May* 1817, the bankrupt paid to the defendant the sum of 500*l.* on account of the purchase of the ship, and gave him a bill of exchange for the further sum of 500*l.* due the 17th of *November* following, which was duly honored, and in *May* 1817, also delivered to the defendant a bill of lading of goods

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similar to the above articles of agreement, of which sum of 6300*l.* the defendant received about 2000*l.*, and the remainder was to be paid three months after the ship's return from *India* to her port of discharge in *Europe*, upon the defendant's empowering *Chivers* to take out the register in his own name. In addition to the sum of 1000*l.* before stated, the defendant received from or on account of the bankrupt the sums of 6*l.* and 9*l.* 19*s.*, and seven pipes of *Madeira*, of which the value was 280*l.* The defendant, upon an application of the assignees, delivered to them an account, in which he made the bankrupt debtor for the sum agreed to be paid as the price of the ship mentioned in the articles of agreement, and for two bottomry bonds; for the outfit to *Calcutta*, for the premiums of insurance to and from *Calcutta*, for broker's charges, and for seamen's wages, and for disbursements at *London* since the return of the ship; and on the other side of the account he gave the bankrupt credit for the two sums of 500*l.*, paid as part of the price of the ship, for returns of premium, for the amount of an average loss settled by the underwriters on the ship, in consequence of damage at *Calcutta*, for 2000*l.*, the proceeds of the goods which in the bills of lading were valued at 4029*l.* 2*s.* 10*d.*, for the proceeds of the ship sold for 3050*l.* and of seven pipes of *Madeira*, and the freight from *Calcutta* to *London*. Upon the accounts so stated the defendant claimed a balance of 3043*l.* 5*s.* 3*d.*

The questions for the opinion of this Court were, first, whether the articles of agreement of the 27th of *May* 1817 were void under the ship register acts; and, secondly, whether the same were or were not void, in what mode or on what principle the account was to be taken

taken between the assignees and the defendant. The account to be taken by an arbitrator out of Court.

This case was argued on a former day in this term by

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Reader for the plaintiffs. The agreement of the 17th of *May* 1817 being a contract for the sale of a ship is void within the 34 G. 3. c. 68. s. 15. That section, after reciting "that by the laws then in force upon any alteration of property in the same ship or vessel in the same port to which such ship or vessel belongs, an indorsement upon the certificate of registry was required to be made," enacted, "that such indorsement should be made in the *manner and form thereafter expressed*, and should be signed by the person or persons transferring the property of the said ship or vessel by sale or contract or agreement for sale thereof; and a copy of such indorsement should be delivered to the person or persons authorised to make registry and grant certificates of registry, otherwise such sale, or contract, or agreement for the sale thereof, should be utterly null and void to all intents and purposes whatsoever." That section, therefore, requires that the indorsement shall be signed by the person transferring the property by sale or contract, *or agreement for sale*. The words of the section apply to an agreement for sale as well as an actual sale. It is true, that the form of indorsement applies in terms only to the sale and actual transfer of the vendor's interest. The statute, however, has been held to extend to the sale of a *part* of the vendor's interest, although the form of indorsement in terms only applies to a transfer of the whole, *Underwood v. Miller*.^(a) Upon the same principle, notwithstanding the form of

(a) 1 Taunt. 387.

indorsement,

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indorsement, the section will apply not only to an actual sale or contract, but to an *agreement* for sale; for otherwise the words of this section will not be satisfied. The term *agreement* for sale must mean something distinct from an *actual* sale. It is used in that sense in the 14th section. That section recites, that doubts had arisen whether every transfer of property in a ship was required to be made by some bill or other instrument in writing, and whether contracts or agreements for the transfer of such property might not be made without any instrument in writing, and then enacts that no transfer, *contract, or agreement for transfer*, shall be valid, unless such transfer, *contract, or agreement for transfer* shall be made by bill of sale containing such recital, as described by the recited act. It is clear, therefore, that the words *agreement for transfer* mean something different from an *actual transfer*; and it may be fairly inferred that the term *agreement for sale* in the clause immediately following, means something different from an actual sale. Independently of the statute, however, the defendant has rescinded the contract, for he sold the ship.

Then if the contract be void, the plaintiffs are entitled to credit for all the money paid by the bankrupt to the defendant on account of the contract, and for all his disbursements on account of the ship, the produce of the goods comprised in the bill of lading, the wine and other articles belonging to the bankrupt which were in the ship when she returned, and were in the possession of the defendant. It must be admitted that the assignees are not entitled to recover for the wages and freight, the captain not having performed his voyage, nor provided a freight home. It may be admitted also on this principle that the defendant is entitled to all such

such disbursements as he has made on account of the outward-bound voyage. At all events, if the contract be void, the Plaintiffs are entitled to the two sums of 500*l.* paid by the bankrupt to the defendant on the faith of that contract, and also to the goods in the ship belonging to him when it returned. It is true that the defendant may have sustained a loss in consequence of not having had the benefit of the employment of the ship on her voyage out to *India*, but that is in the nature of unliquidated damages, and is the subject of an action for the breach of a contract, but not the subject of a set-off. His agents took possession of the ship at *Calcutta*, loaded her home, and he has had the benefit of a homeward bound cargo. The profits on the outward voyage were uncertain, and might have been, as it actually was, a losing adventure.

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Campbell contra. The question is, whether this voyage was on account of the bankrupt, or of the defendant. If it was on account of the bankrupt, then the balance is against the assignees. The question whether the contract be void, does not depend on the 14th section of 34 G. 3. c. 68., but on the 15th. The 14th section is complied with, for the certificate of registry is recited in the agreement for sale. Then the 15th section enacts, that the indorsement shall be made in the manner and form thereafter expressed, and the form given at the end of the clause applies only to a sale and transfer of the vendor's share or interest in the ship. There is no form given applicable to a mere executory agreement to transfer, and of course there can be no indorsement of such an agreement upon the certificate of registry *in the manner and form thereafter expressed*.

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If the statute had said, that if the form given were not pursued, the contract should be void, and no form had been given, it would be clear that the contract would be valid. So if there be no form as to an executory agreement, the act is inoperative as to such agreement. As, therefore, the statute gives no form of indorsement of a contract for sale, such indorsement need not be made on the register, and, therefore, this section does not affect executory contracts. In *Underwood v. Miller* (a) there was no essential departure from the form given, for in that case there was a sale or transfer, although it was only of a part of the interest. In the statute the form is headed, "Indorsement on change of property." Now here there was no change of property. In *Thompson v. Smith* (b) the Vice Chancellor said, that the form of indorsement was adapted only to a total and absolute sale, and would not apply to a transfer by mortgage, the mortgagor not being properly within the term seller, nor the mortgagee a purchaser. As the form of indorsement is applicable only to an absolute sale of the ship, all other transfers remain untouched by the act, and are governed by the same rules and forms which prevailed before the act was passed. Secondly, the agreement is not void in toto. Although it be void as a conveyance of the property in the ship, it is still binding as to the personal covenants. In *Mouys v. Leake* (c) it was held that a rector who had granted an annuity out of his benefice, which was void by the statute 13 *Eliz. c. 20.*, was liable to pay it on the personal covenants contained in the deed. So in *Mestaer v. Gillespie* (d) the Lord Chancellor was of opinion

(a) 1 *Taunt.* 387.(b) 1 *Madd.* 410.(c) 8 *T. R.* 411.(d) 11 *Ves.* 655.

that

that an assignment of freight which was comprized in the bill of sale of the ship, was not within the provisions of these statutes, and that the bill of sale, though void as to the transfer of the ship, of which it purported to make a legal transfer, might be a valid agreement in a court of equity with respect to the freight. And in *Kerrison v. Cole* (a) a bill of sale by a mortgagor was held to be void for not reciting the certificate of registry, but the mortgagor was held to be liable on his personal covenant, contained in the same instrument, for payment of money lent. Now the bankrupt covenants to advance and pay all port charges; the plaintiffs, therefore, cannot recover back such payments. The defendant may charge them by way of mutual credit. At all events, if the agreement is void in toto, the bankrupt is not to be considered as an agent of the defendant; the plaintiffs cannot say that the bankrupt was only the master of the ship, and entitled to wages and disbursements, and that there is an implied promise to repay the money. The bankrupt acted on the footing of the agreement, until after the ship's return to *London*, and the plaintiffs cannot be in a better situation than he was. He sailed in the ship on his own account, and with goods on freight for his own benefit. He had the entire dominion of the ship during the voyage as owner, and received no instructions from the defendant. Now, if there had been no bankruptcy, could *Merriman* have maintained an action to recover the disbursements? It is admitted that the assignees are not entitled to the wages. Then as to the count for money had and received, the plaintiffs cannot recover upon that; for the agreement was in part performed; the bankrupt had the benefit of the contract during a

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(a) 8 *East*, 251.

1825. long interval. [*Bayley J.* Whose duty was it to make the indorsement?] It was the duty of the vendor to make it, but it was also the duty of the vendee, whose title was to be perfected, to see it done, and he had, as captain, the register in his hands. In *Taylor v. Hare* (a) *A.* obtained a patent for an invention of which he supposed himself the inventor, and agreed to let *B.* use it upon payment of a certain annual sum secured by bond; this sum was paid for several years, when *B.* discovering that *A.* was not the inventor, but that it was in public use before *A.* obtained his patent, brought an action for money had and received to recover back the amount of the annuity paid, and it was held that he could not recover. At all events the account must be taken on the footing of the defendant's being entitled to a fair price for the use of the ship during the voyage.

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Cur. adv. vult.

ABBOTT C. J. now delivered the judgment of the Court, and after stating the facts of the case, proceeded as follows:

On the part of the plaintiff it was contended, that the contract for the sale of the ship was void in law; and it was inferred from thence that the plaintiffs, as assignees of *Merriman*, were entitled to recover from the defendant all the money that had been paid by the bankrupt to the defendant, or received by the defendant in part performance, or in respect of the contract, or in any way relating to the voyage, beyond the expenditure for the outfit, &c.

We are all of opinion that an executory contract for

(a) 1 N. R. 260.

the sale of a ship, like the present, is within the provisions of the statute 34 G. 3. c. 68., and, consequently, that this contract for the sale of a ship became void for want of a compliance with the provisions of that statute. But before we adopt the inference sought to be drawn in favor of the plaintiffs, it is necessary to consider the facts that have occurred in this particular case.

The want of compliance with the statute may be considered as the mutual fault, or perhaps rather the mutual mistake of the parties. The defendant was the person to make the indorsement on the certificate, but that instrument was in the hands of the bankrupt, and he did not require the act to be done. The bankrupt was allowed to have the possession of the ship, and sailed in her as her commander, and continued in the command until he thought fit to abandon it. At the ship's return the defendant offered to complete the contract, and transfer the ship, receiving the price, but the bankrupt was unable to pay the price, and complete the contract on his part. The defendant waited the three months mentioned in the contract, and then sold the ship for a less price than the bankrupt had agreed to give for her. In the meantime he had paid very considerable sums which the bankrupt had engaged to pay, and he has received considerable sums in reference to the contract. And the parties have agreed to refer the account to an arbitrator to be taken and settled, upon the principle that the Court shall direct. We think the true principle will be to charge the plaintiffs with the sum for which the arbitrator shall think the ship might have been let or chartered for such voyage, for such expenditure, if any, made by the defendant, as properly belongs to the charterer or freighter of a ship, and such

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further expence and loss, if any, as he shall think the defendant has been put to by any misconduct of the bankrupt in the management of the ship, or his abandonment of the command at *Calcutta*; and for demurrage, if he shall think it right to do so: and against these sums to place the sums received by the defendant in respect of this transaction. Some of the items mentioned in the account appear not to have been received in money by the defendant, or for his use by his agent, before the action brought. The arbitrator should attend to this, if it becomes necessary, with a view to the verdict and to the costs of the cause, and he may provide for their payment when received, so as to put an end to litigation.

We think nothing can be allowed to the bankrupt for wages or otherwise as master of the ship, he having abandoned the command during the voyage.

The verdict to be entered for the plaintiff or defendant according to the event of an award taken on this principle.

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DORDSY *against* COOK.

THE defendant in this case having inadvertently omitted to plead to the fourth count of the declaration, afterwards amended his plea, by inserting the words "and fourth," thereby giving the general issue to the omitted count. The plaintiff afterwards omitted to reply to the defendant's plea to this count, though duly ruled so to do, having before replied to the defective plea; whereupon the defendant signed a general judgment of non-pros. This was set aside by a Judge's order as irregular in being signed to the whole; to discharge which order,

Defendant, by mistake, pleaded the general issue to three instead of four counts. Plaintiff replied; defendant then amended his plea by extending it to the fourth count. Plaintiff not having replied to the amended plea, although ruled so to do, defendant signed judgment of non-pros to the whole action: Held, that this was irregular.

W. E. Taunton now moved, on the ground that a judgment of non-pros could not be signed on a particular count in a declaration, but only on the whole. He urged, that though a defendant may now plead double under the statute, yet that all the pleas so pleaded make one integral plea in this sense, that if the plaintiff omit to reply to one plea, he cannot be said to reply to the plea of the defendant. A judgment of non-pros is a final judgment, on which the defendant may tax his costs, and take out execution, *Tidd's Pr.* 6th ed. c. 27. p. 718. There is no instance of a partial judgment of non-pros to be found in the entries. It is always general, stating "And the said *A. B.*, although at this day solemnly called, comes not, nor hath he replied to the aforesaid plea of the said *C. D.*, nor doth he further prosecute his said suit," &c.

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against
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Per Curiam. It would be very inconvenient if a judgment of non-pros could not be partially signed. There may be issues in law, and issues in fact joined, and it by no means follows that, because the plaintiff abandons the one, he necessarily does the other. The judgment of non-pros can only be signed to that part of the suit which is actually not prosecuted.

Rule refused.

Thursday,
May 12th.

Ex parte BEECHING and Others.

Where a prisoner is brought up under a habeas corpus issued at common law, he may controvert the truth of the return by virtue of the 56 G. 3. c. 100. s. 4.

UPON the return to a writ of habeas corpus it appeared that the person making the return had apprehended and detained *Beeching* and several other persons, under the provisions of the 24 G. 3. c. 47., and 45 G. 3. c. 121., on a charge of smuggling.

Platt, for the prisoners, tendered affidavits controverting the truth of the facts stated in the return, and contended, that he was entitled to do so, by the 56 G. 3. c. 100. ss. 3. & 4. (a), this not being a criminal matter.

(a) The first and second sections of this act provide for the issuing and returning of writs of habeas corpus by and before any one of the Judges in vacation, in cases other than for criminal matter or for debt. The third section enacts, "that in all cases provided for by this act, although the return to any writ of habeas corpus shall be good and sufficient in law, it shall be lawful for the justice or baron before whom such writ may be returnable, to proceed to examine into the truth of the facts set forth in such return by affidavit or affirmation, and to do therein as to justice shall appertain."

The fourth section enacts, "that the like proceeding may be had in the court for controverting the truth of the return to any such writ of habeas corpus awarded as aforesaid, although such writ shall be awarded by the court itself, or be returnable therein."

Inform-

Informations might have been filed against the prisoners in the Court of Exchequer, but they are not considered as criminal proceedings; *Attorney-General v. Boreman*. (a)

1825.

Ex parte
BRECHING.

The *Attorney-General*, *Twiss*, and *Maule*, contra, contended, that the return was conclusive.

ABBOTT C. J. The object of the habeas corpus act, 31 Car. 2. c. 2. was to provide against delays in bringing persons to trial, who were committed for criminal matters. The person making this return is not a person to whom the prisoners have been committed for any such matter. The habeas corpus in this case was, therefore, a writ issuing by virtue of the common law; and I think, that under such circumstances the 56 G. 3. c. 100. s. 4. gives to the prisoners a right to controvert the truth of the return.

Affidavits on both sides were then read, and the merits having been discussed, the prisoners were remanded.

(a) 2 B. & P. 532. n.

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LAMBERT *against* TAYLOR and Another, Executors of GEORGE RENTON deceased.

In assumpsit against executors, declaration stated that testator made his promissory note, and thereby promised to pay *J. Y.* on demand 200*l.*, and delivered the note to him, whereby testator became liable to pay, but did not pay, and at the time of his death was indebted to *J. Y.* for the amount of the sum secured by the note, and interest. It then averred, that afterwards, and after the death of *J. Y.*, the money specified in the note being and remaining wholly due and unsatisfied, to wit, on, &c., at, &c., before *A. B.*, one of the coroners for the county of *N.*, it was found, upon view of the body of *J. Y.*, then and there lying dead, by the oaths of honest and lawful men, of, &c., that the said *J. Y.* feloniously did kill and murder himself, as by the inquisition before the coroner remaining of record more fully appeared, by reason of which said inquisition, and by force of the felony, the said *J. Y.* forfeited to the king the promissory note and the money due thereon. The declaration then set forth a grant under the king's sign manual to the plaintiff of the note and money due thereon, as mentioned in a certain other inquisition, and that his majesty delivered the note to the plaintiff, of which the defendants, after the death of the testator, had notice. Breach, non-payment by testator or the defendants since his death. Plea, first, non-assumpsit testator. Secondly, that the note became due and payable to *J. Y.* in his lifetime, and that the causes of action did not accrue to him within six years before the exhibiting of the bill; upon which plea issue was taken and joined. Thirdly, nul tiel record of the inquisition taken before the coroner; upon which issue was taken. Fourthly, that there was no such grant as alleged in the declaration. The issue on the plea of the statute of limitations having been found for the defendants, and all the other issues for the plaintiff, it was held, on motion, to enter a nonsuit:

First, that it was not necessary for the plaintiff to produce at the trial the inquisition mentioned in the king's grant, inasmuch as that was an office of instruction only, and not of entitling; the title of the crown having accrued by the felony under the coroner's inquisition.

Secondly, that the grant under the sign manual was sufficient to pass the property in the note.

Held, thirdly, on motion in arrest of judgment, that inasmuch as the declaration alleged that the testator was, at the time of his death, indebted to *J. Y.*, the payee of the note, in the principal and interest due thereon, it sufficiently appeared that the note was a security for a debt, and that the debt and security having passed to the crown by operation of law, were assignable by the crown without indorsement.

Held, fourthly, assuming it to be necessary, in order to vest the chattels of a *felo de se* in the crown, that the coroner's inquest should be found by twelve men, that it must be taken after verdict that the inquest was so found.

Held, sixthly, on motion by the plaintiff for judgment non obstante veredicto, that the plea of the statute of limitations, that the causes of action did not accrue to *J. Y.* within six years, was bad, inasmuch as it did not shew that *J. Y.* was barred by the statute at the time of his death; and if he was not, then the king, not being expressly mentioned in the statute, was not within the statute, and his rights were not barred.

Held, seventhly, that the averment, that the note became due to *J. Y.* in his lifetime being an acknowledgement that he, at one time, had a good cause of action (which had passed to the crown by forfeiture, and from the crown to the plaintiff); a cause of action was thereby confessed by the plea, and the matter pleaded in avoidance being insufficient, the plaintiff was entitled to judgment non obstante veredicto.

made

made his promissory note in writing, and delivered the same to *J. Y.*, and thereby promised to pay on demand to *J. Y.*, or his order, 200*l.*, with legal interest, whereby *Renton* became liable to pay to *J. Y.*, in his lifetime, the sum of money in the note specified, according to the tenor and effect of the note; and being so liable, promised the said *J. Y.*, in his lifetime, to pay him the money in the note specified, according to the tenor and effect of the note. It then averred, that *G. Renton* did not pay the sum of money in the note mentioned, or any part thereof, but that he, at the time of his death, was indebted to *Younghusband* in the sum of money secured by the promissory note, and all the interest due thereon, to wit, at, &c. The declaration then stated, that afterwards, and after the death of *J. Younghusband*, the sum of money in the note specified, being and remaining wholly due and unsatisfied, to wit, on the 11th day of *November* 1818, at *Alnwick*, in the said county of *Northumberland*, before *T. A. Russell*, then one of the coroners of our lord the king for the county of *Northumberland*, it was found, upon view of the body of *J. Younghusband*, there lying dead, by the oath of honest and lawful men of the same county, that the said *J. Younghusband* feloniously, wilfully, and of his malice aforethought, did kill and murder himself, as by the said inquisition before the aforesaid coroner, remaining of record, more fully appeareth; by reason of which said felony and by force of the said inquisition before the coroner in form aforesaid taken, the said *J. Younghusband* forfeited to our lord the late King *George* the Third the said promissory note, and the money then due thereon, to wit, at, &c. That afterwards, to wit, on the 23d day of *November* 1821, at, &c., his present majesty did, by his warrant,

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bearing date the same day and year last aforesaid, under his royal sign manual, give and grant unto *J. Lambert*, the plaintiff, his executors, administrators, and assigns, among other things, the said note, sum and sums of money due thereon, mentioned and set forth, among other things, in a certain *inquisition of the 24th day of August 1819*, and which note and premises had become so forfeited to his said majesty as aforesaid, and all and every other the goods and chattels, monies, personal estate, and effects of the said *John Younghusband*, to which his said majesty was then entitled, and in whose hands soever the same might be, and all his said majesty's estate, right, title, and interest thereto, together with full power and authority to the said *J. Lambert*, his executors, administrators, and assigns, to ask, demand, sue for, recover, and give effectual releases and discharges for the same, or any parts thereof, and to settle all accounts and reckonings whatsoever relating thereto; to have and to hold the said note, among other things, sum and sums of money, and other the premises in the warrant before granted, unto him, *Lambert*, his executors, &c., upon the trusts, and for the intents and purposes in the said warrant expressed and declared; that is to say, amongst other things, that *Lambert*, his executors, &c. should call in and compel payment of the said monies due on the aforesaid security by the warrant granted, and of all other the debts due and owing to *J. Younghusband*, as by the said warrant, reference being thereto had, would more fully and at large appear; and his said majesty then and there, to wit, on, &c., delivered the said note to the plaintiff, to wit, at, &c., of which said several last-mentioned premises the defendants, as executors as aforesaid, afterwards, and after the death of *Renton*, to wit, on the

the 10th day of *April* 1813 there had notice, and were thereupon requested to pay the sum of money in the note specified to the plaintiff, as such grantee, as aforesaid, according to the tenor and effect of the said note, and of the said royal warrant whereby the same was so granted to the plaintiff. Breach, non-payment by *Benton* in his lifetime, or by the defendants, his executors. Plea, first, non-assumpsit by *G. Benton*, and issue thereon. Secondly, that the supposed promissory note in the declaration mentioned, became due and payable to *J. Younghusband* in his lifetime, and that the supposed causes of action in the declaration mentioned did not accrue to the said *J. Younghusband* at any time within six years next before the exhibiting of the plaintiff's bill; upon which plea issue was taken in the replication. Thirdly, that there was not any such record of the said supposed inquisition before the aforesaid coroner as the said plaintiff had in his declaration alleged. To which plea the plaintiff replied, that there was such a record; and issue was joined upon the record, which record was produced to the Court, and that issue found for the plaintiff. Lastly, the defendants pleaded that his majesty did not make any such gift or grant unto the plaintiff as the plaintiff had in his declaration alleged; and upon that plea issue was joined. At the trial before *Bayley J.* at the *Northumberland Summer assizes* 1823, the jury found a verdict for the plaintiff on the first and last issues, with 250*l.* damages, with liberty to the defendants to move to set aside the verdict, and enter a nonsuit, in case the Court should be of opinion either that the second inquisition mentioned in the declaration ought to have been produced at the trial, or that the grant by his majesty, not being under seal, was not

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not sufficient to pass the interest in the promissory note to the plaintiff. Upon the second issue, namely, the statute of limitations, the jury found a verdict for the defendants. Upon a motion being made in this court on the part of the plaintiff to enter up judgment for him non-obstante veredicto on the second issue, and at the same time a motion being made on the part of the defendants for a rule in that event to shew cause why a judgment of nonsuit should not be entered upon the two grounds above mentioned, or why the judgment should not be arrested on the following grounds: 1st, Because the note was not indorsed by the payee, and no interest therein passed by forfeiture to the late king, nor by his demise to his successor, nor by the grant or warrant under the sign manual to the plaintiff. 2dly, Because the recital in the declaration of the coroner's inquisition does not shew the manner of the death, and because it is not alleged that such inquisition was found on the oath of twelve lawful men.

The Court directed the facts, together with the pleadings, to be stated for their consideration in the form of a special case.

The note of hand set out in the declaration was duly made by the defendant's testator, and given by him to *J. Younghusband* for value received. At the trial the plaintiff produced a grant or warrant from his present majesty, bearing date the 23d of *November* in the second year of his reign, under the sign manual of his majesty, and countersigned by two of the lords of the treasury; which grant or warrant, after reciting the inquisition of the 11th of *November* 1818 before the coroner (as mentioned in the declaration), proceeded to state, "that it had been represented to his majesty by the commissioners,

missioners, that by an inquisition on a writ ad melius inquirendum issued out of the Court of King's Bench at *Westminster*, taken in the parish of *Alnwick* on the 24th of *August* 1819 before the said sheriff, it was found (amongst other things) that *G. Renton* of *Bamburgh* aforesaid, yeoman, was at the time of the death of the said *J. Younghusband* indebted to him in the sum of 200*l.* for principal and 5*l.* for interest due upon a certain promissory note made by *G. Renton* and one *H. Harvey* of *Bamburgh* aforesaid, deceased, jointly and severally to the said *J. Younghusband*, bearing date the 12th day of *May* 1813, and that the said note was of the value of 200*l.* exclusive of interest." The warrant then stated that his majesty granted to *Lambert* all and singular the bonds, notes, sum and sums of money mentioned and set forth in the inquisition respectively of the 24th of *August* 1819; and also all such goods and chattels comprised and set forth in the said inquisition as were not sold as aforesaid, and which became forfeited to the crown; and all and every of the goods and chattels, monies, personal estate and effects of *J. Younghusband* to which his majesty was entitled, and all his majesty's estate, right, title, and interest thereto, &c.

The questions for the opinion of the Court were:

1st, Whether the plea of the statute of limitations were a sufficient bar to the action; and if so, the verdict for the defendant to stand; and if not, then

2d, Whether either of the alleged grounds of nonsuit were sufficient, and if not, then

3d, Whether any of the alleged grounds for arresting the judgment were sufficient.

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Tindal for the plaintiff. The statute of limitations is no bar to this action, and the plaintiff is entitled to judgment non obstante veredicto. The note given by *Renton* to *Younghusband* is dated the 12th of May 1813, and was payable on demand. In November 1818 *Younghusband* became *felo de se*. Before the debt was barred by the statute, it had vested in the king; for the goods of a *felo de se* are forfeited to the king by the fact, and before inquisition found, *The King v. Ward, executor of Wentworth (a), Finch's Law*, 216. *Toomes v. Etherington. (b)* From the moment when the property was in the king, the statute of limitations would cease to operate; for the king, generally, is not, by the general words of an act of parliament, restrained of a liberty or right which he had before, if he be not named in the act. (c) Now, the king is not named in the statute of limitations, therefore, from November 1818 the statute ceased to operate against the crown. The grantee of the crown must have the same privilege, otherwise the king's grant would be rendered inoperative. At all events, the plea stating that the causes of action did not accrue to *Younghusband* within six years is bad in form, for that would be true if the king had kept the note seven years; and if that were the fact, it would not be a defence to the action. The issue raised upon that plea is, therefore, immaterial. If the plea had been, that the causes of action did not accrue to *Younghusband* within six years before his death, that would have been a bar. Supposing that the statute of limitations was only suspended during the time the debt was in the hands of the crown, the defendant

(a) 1 Lev. 8.

(b) 1 Saund. 361.

(c) Plowd. 240.

should

should have pleaded specially that the causes of action did not accrue to *Younghusband* or to the plaintiff within six years, during which the right of suing was vested in a subject. Then as to the alleged grounds of nonsuit, it was unnecessary to produce the inquisition mentioned in the king's warrant, as it was not put in issue; that could only have been done by plea of nul tiel record. The only plea is that *Renton* did not promise; that does not put the inquisition in issue. If it be objected that the second inquisition is not directly alleged so that it could not be traversed, that is ground of special demurrer only. But the second inquisition is immaterial, for it is an office of information only, and not of intitling. The plaintiff's title was perfect by the coroner's inquisition and the king's warrant. Neither is it a valid objection to the grant that it was not under the great seal. It is true, that by the common law, no grant of lands by the king is available or pleadable, unless under the great seal, *Lane's case* (a); but a grant of a chattel interest was always good under the privy seal; *Com. Dig. Patent*, C 5.; and the custom has always been to grant by warrant chattels forfeited to the crown; and the passing of the 59 G. 3. c. 94., by which the king may, by warrant under the sign manual, grant lands coming to the crown by escheat or forfeiture, is a strong proof that the right of granting chattels by warrant existed before.

The alleged grounds for arresting the judgment are equally insufficient. That the note was not indorsed can make no difference, because it was forfeited to the crown in the state in which it then was, it vested in the crown by operation of law, and the king may assign a chose in

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action as a recognizance, obligation, &c., or a debt. *Com. Dig. Assignment, (D.)* The objection to the declaration that it does not contain any statement of the manner of the death is merely a ground of special demurrer. At most the fault is merely in not having set out enough of the coroner's inquisition; but that is pleaded with reference to the record, which is in this court. And as to the objection, that it does not appear that the inquisition was found by twelve men, there is no authority to shew that twelve are requisite. By the *stat. 4 Ed. 1.* the coroner is to go to the place where any is slain, and to command four, five, or six of the next town to come before him, and inquire of the particulars therein mentioned; and in *Finch's Law*, b. 4. c. 24. p. 323., it is laid down, that the just number of twelve are not requisite, but that there may be more or less. Besides, assuming that twelve were necessary, it must be taken after verdict that there were that number.

Cross Serjt. contra. The two principal objections to the plaintiff's recovery are, certainly, that the plea of the statute of limitations is an answer to the action, and that the interest in the note could not pass to the plaintiff for want of indorsement. The plaintiff in his declaration does not found his claim on a title accruing by the custom of merchants, but by an assignment from the crown. The plea is, that the note became due in the lifetime of *Younghusband*, and that the causes of action did not accrue to him within six years, and the jury have found that fact for the defendant. If the plaintiff had intended to insist that the title to the note vested in the crown before the six years expired, he ought to have replied that matter specially. In *Murray v. The East*

India Company (a), which was an action by an administrator upon a bill of exchange, payable to the intestate, and accepted after his death, the declaration stated the drawing of the bill, and the acceptance after the death of the intestate, the granting of the letters of administration to the plaintiff, the defendant's liability, &c.; and the defendants pleaded that the cause of action did not accrue within six years, to which the plaintiffs replied, that it did accrue within six years, the Court held that a special replication was not necessary, because the fact, that the acceptance was after the death of the intestate, appeared upon the face of the declaration. But here, the fact that *Younghusband* died before the six years expired, is not averred in the declaration; and if he did not die within that period, the statute of limitations is an answer to this action. In *Rex v. Morrall (b)*, a plea that the action did not accrue to the crown debtor within six years next before the death of the crown debtor, was held to be good upon demurrer. Then, as it does not legally and in proper form appear upon the record that the action did accrue to the crown within six years, the defendant is entitled to judgment. [Abbott C.J. The argument is, that your plea is bad, because you ought to have alleged that the causes of action did not accrue either to *Younghusband* or the plaintiff within six years. Holroyd J. If you had pleaded that *Younghusband* did not die within six years after the making of the note, and that the causes of action did not accrue within six years, that would have been a good plea, but the fact stated in your plea may or may not be a good defence. If *Younghusband* died within the six years, the debt

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(a) 5 B. & A. 204.

(b) 6 Price, 24.

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having on his death vested in the crown, it would be no defence; but if he died after the six years, then it would be a defence.] *The King v. Morrell* is an authority to shew that this plea is an answer to the action as against the plaintiff. It is not necessary to contend that it would be a good plea as against the crown.

In the next place, the property in the note could only pass by indorsement under the statute of *Anne*, by which notes are made negotiable in the same manner as inland bills of exchange, that is, according to the custom of merchants. Now here, the plaintiff does not found his claim upon an indorsement according to the custom of merchants, but upon an assignment from the crown. The title of the crown did not accrue by indorsement, but by the felony. Assuming that the crown might by operation of law, without indorsement, acquire property in such an instrument, yet it could not transfer the property, except by indorsement. It was decided in *Rawlinson v. Stone* (a), that an administrator might pass a promissory note according to the custom of merchants. Although, therefore, the property vested in the king by the felony, yet it would not pass from the king to the assignees without indorsement. It is true, that the king may assign a debt, but this is an assignment, not of a debt, but of a promissory note, which is only evidence of a debt; for the declaration does not allege any debt, but the plaintiff sues only as a party claiming under the promissory note.

As to the second inquisition, it must be admitted that it was not necessary to prove it, and it is impossible to contend that the assignment should have been under the

(a) 3 Wils. 1.

great seal, inasmuch as it appears to have been the constant usage to assign the goods of a felon by the sign manual.

As to the coroner's inquisition, it certainly always has been usual that it should be taken by twelve men.

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Tindal in reply. It is alleged in the declaration that the inquest was taken on a particular day, as appears by the record, and there was a plea of nul tiel record, upon which issue was joined, and found for the plaintiff; that, therefore, shews that *Younghusband* died within six years after the making of the note. [*Abbott C. J.* The plaintiff might have supported that issue by producing a record of a different date.] The plea raises an immaterial issue, and, therefore, no judgment can be given upon it for the defendant. [*Bayley J.* The issue is, whether any cause of action had accrued to *Younghusband* within six years before the exhibiting of the bill. Now if *Younghusband* had lived six years after the making of the promissory note, the crown would have been barred, and then there would have been a verdict against the plaintiff, and the merits also would be against him; but upon this issue, although the verdict is against the plaintiff, the merits may be with him, for although the cause of action may not have accrued to *Younghusband* within six years, yet the right may have vested in the crown within six years after the making of the promise, and the assignee of the crown may be entitled. Therefore, as it is uncertain on what state of facts the verdict is founded, must there not be a repleader?] The plea of the statute of limitations is not a bar of the right but of the remedy. It amounts to a confession and avoidance, for it confesses a debt, and avoids it by matter of law.

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Here the plea confesses a cause of action, and the matter pleaded in avoidance being insufficient, the plaintiff is entitled to judgment, *Pitts v. Polehampton*.^(a) In *Rex v. Morrell* ^(b), the debt was barred before it vested in the crown.

As to the objection that the declaration does not shew a debt seizable by the crown, there is not only an allegation that the promissory note was given, but that a debt was actually due.

Cur. adv. vult.

ABBOTT C. J. now delivered the judgment of the Court, and after stating the facts of the case, proceeded as follows :

We are of opinion that neither of the alleged grounds of nonsuit is sufficient. The second inquisition, that is the inquisition taken before the sheriff upon the writ of *melius inquirendum*, was an office of instruction only, and not an office of intitling. The title of the crown accrued by the finding of the felony under the first, that is, the coroner's inquisition. The second formed no part of the title, and, therefore, it was not necessary to produce it at the trial.

The grant of his majesty under his sign manual was, in our opinion, sufficient to pass to the plaintiff the property in this note. A debt or chose in action vested in the crown is assignable at law, and there is no authority which has said that such an assignment must be under the great seal or any other seal; and the constant course of practice has been, to grant such things under the sign manual.

(a) 1 *Ld. Raym.* 590.

(b) 6 *Price*, 24.

We are also of opinion that there is not any sufficient ground to arrest the judgment. The declaration alleges that *Renton*, the maker of the note, was at the time of his death indebted to *John Younghusband*, the payee, in the principal sum secured by the note, and all interest then due thereon. Then it sufficiently appears that the note was a security for the debt, and we think the debt and the security passed to the crown by the felony, and were assignable by the crown without indorsement. The crown takes by operation of law, and, therefore, an indorsement is not necessary to give a title to the crown; and the assignment by the crown takes its effect from a general rule of law, and not from the custom of merchants or other special custom.

Supposing it to be necessary that a coroner's inquest should be found by twelve jurors in order to vest the chattels of a *felo de se* in the crown, upon which point we do not think it necessary to give any opinion, we think it must be taken that the inquisition in question was so found.

The only remaining point is that which arises upon the plea of the statute of limitations 21 *Jac.* 1. *c.* 16. *s.* 3. The plea alleges that the note became due and payable to *J. Younghusband* during his life, and that the supposed causes of action did not accrue to him, within six years before the exhibiting of the plaintiff's bill. Upon this plea the plaintiff took issue, and the issue has been found for the defendant, viz., that the causes of action did not accrue, &c. We are of opinion that the plea is bad in law. It is not like the plea in the case of the *King v. Morrell*. (a) That was a proceeding by *scire facias* at

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the suit of the crown, founded on a writ of diem clausit extremum against a debtor to the crown, under which the defendant was found indebted to the crown's debtor upon a bill of exchange, and the scire facias called upon the defendant to pay the bill to his majesty. The defendant pleaded that the debt was not contracted, and did not accrue due to the crown's debtor at any time within six years next before the death of the crown's debtor. And upon demurrer the plea was held good upon the ground that the crown is only entitled to its debtor's right, and cannot create or revive a right, if none existed, or it has become barred; and that as the crown's debtor could not have recovered if the statute had been pleaded, so neither could the crown standing in the same situation as its debtor. In the present case the plea does not shew that *Younghusband* was barred by the statute at the time of his death, and if he was not so barred, then a right vested in the crown, and the rights of the crown are not barred or affected by the statute. The crown is not within the operation of the statute,

The plea then being bad, the defendant certainly cannot have judgment, although the issue is found for him, the issue being taken on an immaterial matter. And the question whether the plaintiff can have judgment, or whether there ought to be a re-pleader, depends upon the question whether the plea does or does not contain a confession of a cause of action; if a cause of action be confessed by the plea, and the matter pleaded in avoidance be insufficient, the plaintiff is entitled to judgment, notwithstanding the verdict. If the plea does not confess a cause of action there must be a re-pleader, *Pitts*

v. *Polehampton*. (a) Now admitting that a plea of *actio non accrevit infra sex annos* as generally pleaded does not admit that any cause of action did at any time accrue, yet this plea does not contain that matter alone, but it contains an assertion that the note became *due and payable* to *Younghusband* in his life-time. This is an acknowledgment that *Younghusband* had at one time a good cause of action, and if he had a cause of action, the right to sue would upon the facts alleged in this declaration pass to the crown, and from the crown to the plaintiff, unless the defendant has alleged some matter of fact sufficient in law to shew that such right did not so pass, or, in other words, unless the matter of fact pleaded in bar be a good bar in law to the action. I have already said that we think it is not a good bar; and then a cause of action being confessed and not well avoided, the plaintiff is entitled to judgment.

The rule, therefore, will be that judgment be entered for the plaintiff, non obstante veredicto.

Judgment for the plaintiff.

(a) 1 *Ld. Raym.* 590.

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BUCKLE *against* BEWES. (a)

Where a statute gives treble damages, the plaintiff is entitled to three times the full amount of the damages found by the jury.

THIS was an action on the statute 29 *Eliz. c.4.* against a sheriff for extortion, and the plaintiff had obtained a verdict for 50*l.* 5*s.* damages. The master had computed the treble damages in the same mode as treble costs are calculated (b); and allowed 87*l.* 18*s.* 9*d.*

Parke had obtained a rule nisi that the master should review his taxation and allocatur, and allow the plaintiff three times the full amount of the damages found by the jury; and he cited a manuscript note from the master's office, by which it appeared that in *Woodgate v. Knatchbull* (c) the damages were so computed, and submitted to without any application to the Court.

Carter now shewed cause, and contended that treble damages should be computed in the same manner as treble costs.

But the Court said that they would abide by what was done in *Woodgate v. Knatchbull*, which was according to the plain meaning of the statute.

Rule absolute.

(a) This case was decided in *Hilary* term, but was then accidentally omitted.

(b) See *Tidd's Pr.* 1023., 6th edit.

(c) 2 *T. R.* 148., but in which this point is not noticed.

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ABBOTT C.J. That case proceeded entirely upon the 17th section, which enacts, "that if upon re-measurement of any such coals which shall be re-measured to ascertain the contents of each particular sack thereof, it shall appear to the meter so re-measuring the same that any sack or sacks of coals shall not contain three bushels, then and in every such case the vender or venders of such coals shall for every sack of coals that shall be so found deficient on such re-measurement forfeit and pay any sum not exceeding 40s." The magistrate therefore under this section had the power to reduce the penalties, so that the aggregate of the penalties recovered might not exceed 20l. Now where a statute gives a discretionary power of mitigating penalties, it is a general rule that there the legislature must be taken to have intended to place the matter under the jurisdiction of the justices of peace. Under the 33d section, upon which this action is founded, the amount of the penalties depends absolutely upon the number of chaldrons sold; and the plaintiff having brought his action to recover twenty-five penalties of 20l., it follows that this was a matter not within the jurisdiction of the magistrate, and that the action was properly brought.

Rule refused.

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ALDBOROUGH HENNIKER *against* TURNER.

COVENANT. Declaration stated that before the making of the indenture thereafter mentioned, Lord *Henniker* was seised in his demesne as of fee of and in the tenements thereafter mentioned to have been demised, and being so seised, afterwards, to wit, on the 29th of *September* 1814, by indenture demised the said tenements thereafter mentioned, haberdum for fourteen years from the date thereof, at the rent of 145*l.* per annum, payable by the defendant on the four most usual feasts or days of payment in the year; the first payment to be made on the feast of the birth of our Lord Christ then next ensuing. Covenant by the defendant to pay rent at the days and times thereinbefore mentioned. Averment, that defendant entered. The declaration then shewed that the plaintiff, on the 12th of *November* 1819, became seised in his demesne as of fee, of the reversion of one undivided fifth part or share of and in the said demised premises, with the appurtenances, as one of five tenants in common, and alleged, as a breach, that after the making of the indenture, and after the plaintiff became so seised as aforesaid, and during the term, to wit, on the feast day of the nativity of *Saint John the Baptist*, in the year of our Lord 1824, that is to say, on the 24th day of *June* 1824, at, &c., a large sum of money, to wit, the sum of 21*l.* 15*s.*, one fifth part of the said rent of 145*l.* for three quarters of a year of the said term then elapsed, became due from the defendant to the plaintiff, according to the form and effect of the said indenture, and of the covenant so made as aforesaid, and

by

Where one of five tenants in common brought covenant on a lease for rent payable on the four most usual days of payment in the year, and the breach was, that on the 24th day of *June* 1824, a large sum of money, to wit, the sum of 21*l.* 15*s.*, one-fifth part of the rent for three quarters of a year of the term then elapsed, became due from the defendant to the plaintiff, and still was in arrear: *Hekl*, good upon special demurrer.

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by reason of the premises, and still is in arrear and unpaid, contrary to the said covenant of the defendant.

Demurrer, assigning for causes first, that the plaintiff had alleged in the breach that a certain specific sum of money, viz., 21*l.* 15*s.*, was due to him for his share of the rent, when he should not have alleged that a specific sum was due to him for and on account of his share of the rent, but should have declared for one undivided fifth part of the amount of the three quarters rent stated to be due. Secondly, that it was averred that the sum claimed as one fifth part of the rent for three quarters of a year of the term *then* elapsed, became due; that this averment did not set forth with sufficient certainty for which three quarters of a year of the term the said sum was claimed to be due.

Chitty in support of the demurrer. Since the case of *Twynam v. Pickard* (a), it must be admitted that covenant will lie by the assignee of the reversion of part of the demised premises. In *Midgley and Another v. Lovelace* (b), *Holt* C. J. lays it down, that if tenants in common sever in debt, they must not each of them make his demand of such a certain sum which amounts to a moiety, but the demand must be de una medietate of the whole rent. And this is adopted in *Bac. Abr. tit. Joint Tenant and Tenant in Common*, (K.) [*Abbott* C. J. Suppose the declaration had alleged that one-fifth part of the whole rent, amounting to a certain sum, to wit, 21*l.* 15*s.*, had become due, would that have been good?] That is not the manner in which it is alleged here. Then, as to the second objection, it does not appear with sufficient certainty for what period the rent had become due; and in *Gilbert on Debt*, 407. it is laid down, that in declarations for rent, the plaintiff ought to

(a) 2 *B. & A.* 105.(b) *Carth.* 289.

set forth at what day or feast the rent became due, for the declaration upon a demurrer will be held too general where it only mentions so much rent to be due to the plaintiff. He then states a case where *A.* had declared on a lease for three years, rendering rent at *Michaelmas* and *Lady-day*, and declared for rent in arrear for two years, without shewing at what feasts due, and upon motion in arrest of judgment, as it appeared that two of the three years only were expired, it was held certain enough after verdict. This shews that it would not have been good on demurrer. Besides the rent does not become due until the last moment of the day, and, therefore, if the plaintiff seeks to recover for the three quarters ending the 24th day of *June*, it is not true that that rent was due for three quarters *then* elapsed.

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Halcomb, contra, was stopped by the Court.

ABBOTT C. J. It is very unwise to depart from the common course of precedents, but I think that this declaration is sufficient. This is not an action of debt but of covenant; and even in ancient times the latter form of action was treated with more liberality than the former. The strict rule insisted on applies only to the action of debt. I can not see any difference in the sense between the expression "that a fifth part of the rent being 21*l.* 15*s.*, became due," or "that 21*l.* 15*s.* being a fifth part of the rent, became due," the only mode of ascertaining the sum actually due being by dividing the whole rent by 5.

The next objection is founded on the expression "then elapsed." It is admitted, that if the word "then" had been omitted, the objection would have been removed; but it is insisted, that the three quarters ending

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ending on the 24th of *June* were not elapsed till the last moment of the day, but I think we must give such a meaning to these words as will make them consistent with the previous part of the sentence. Now it is alleged, that on the 24th day of *June* 1824, the money became due for three quarters of a year, and I think, that notwithstanding the words "then elapsed," it must be taken to have accrued due for the three quarters of a year immediately preceding the 24th day of *June*.

Judgment for the plaintiff.

PHILPOT *against* PAGE. (a)

A motion for a new trial cannot be made after a motion in arrest of judgment.

CASE for a libel. A verdict having been found for the plaintiff, *Platt* on the 2d day of last term moved in arrest of judgment; the Court refused the rule and on the following day he moved for a new trial, and obtained a rule nisi.

F. Kelly shewed cause and contended that the rule ought not to have been granted, the motion having been made after a motion in arrest of judgment, *Tuberville v. Stamp*. (b)

Platt contra. That case is also mentioned in 1 *Salk*. 23., by which it appears that the rule in arrest of judgment had been argued, so that the motion for a new trial could not have been made until after the first four days of the term had expired. There does not seem to be any objection, in principle, to the present rule. On the

(a) Three of the Judges of this court sat, as upon former occasions, from *Tuesday* the 17th of *May* until *Saturday* the 21st of *May* inclusive; and from *Monday* the 30th of *May* until the first day of *Trinity* term, and on those days this and the following cases were argued and determined.

(b) 2 *Salk*. 647.

return

return of the venire a rule for judgment is given, and at any time before that expires, it seems reasonable that the losing party should be allowed to come and shew cause why judgment should not be given.

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BAYLEY J. I am of opinion, that the application for a new trial being after a motion in arrest of judgment, was too late; and it is important to keep the various steps in causes distinct. When a motion is made in arrest of judgment it is admitted that there is a verdict to which no objection can be made. The usual and proper course is, where a rule for a new trial is granted, to apply at the same time for leave to move in arrest of judgment, if there be any objection apparent on the record. If the proceedings were entered on the record as they occur, the course would be to read the *postea*, by which a subsisting verdict would be shewn, and then to move in arrest of judgment, *Rex v. White.* (a)

HOLROYD J. concurred.

Rule discharged.

(a) 1 Burr. 333.

MANIFOLD *against* PENNINGTON and Others.

CASE for disturbance of common. The declaration alleged that the plaintiff was possessed of a messuage and 200 acres of land, with the appurtenances, in the parish of *St. Martin in the Vintry*. Plaintiff claimed a right of common for all his commonable cattle. The proof was, that he had turned on all the cattle that he kept, but he had never kept any sheep: Held, that this was evidence of a right for all commonable cattle, which ought to have been left to the consideration of the jury.

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parish of *Budworth* in the county of *Chester*, and by reason thereof was entitled to common of pasture for all his commonable cattle, levant and couchant; and that defendants disturbed him in the exercise of this right. Plea, Not guilty. At the trial before *Warren C. J.* of *Chester*, at the last *Summer* assizes for that county, the plaintiff proved that he was a freeholder in the township of *Leigh*, in the parish of *Budworth*, and had been in the habit of turning on to the common in question all the commonable cattle that he had, but he had never kept any sheep. Other freeholders who kept sheep put them on the common. The learned judge thought that the plaintiff had not proved the right as laid, and directed a nonsuit. A rule for a new trial was obtained by *Parke* in *Michaelmas* term, when the case of *Ricketts v. Salway* (a) was relied on.

D. F. Jones and *Cottingham* shewed cause. This case is very distinguishable from *Ricketts v. Salway*. [*Bayley J.* Was not proof of turning on all the cattle he had evidence of the plaintiff's right to turn on all commonable cattle?] That might possibly be the case. The plaintiff, however, did not rely upon that at the trial, but contended that he had actually proved the claim as laid. He certainly had not, and looking at the case in that point of view the nonsuit was right.

Per Curiam. If there had been evidence of the plaintiff's having kept cattle which he did not turn on, that might have varied the case. But the evidence given ought to have been left to the jury, and it was for them

(a) 2 B. & A. 360.

to judge of the effect of it, *Ballard v. Dyson*. (c) The rule must, therefore, be made absolute; and it is unnecessary to say whether this does or does not come within *Ricketts v. Sabney*.

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Rule absolute.

(c) 1 Tamm. 279.

WHARTON against WALKER.

ASSUMPSIT for money had and received, and on an account stated: Plea, Non-assumpsit. At the trial before the Recorder of *Chester*, at the last *Summer* assizes for that city, it appeared that one *Lythgoe* was indebted to the plaintiff in the sum of 4*l.* 5*s.*, and gave the plaintiff an order upon the defendant, who was his tenant, to pay that sum out of the next rent that became due. The plaintiff transmitted the order to the defendant, but had not any direct communication with him upon the subject. When the next rent became due and was demanded by *Lythgoe*, the defendant produced the order, the amount of which he promised to pay to the plaintiff, and paid *Lythgoe* the difference between that and the sum due for rent, and thereupon *Lythgoe* gave him a receipt for the whole sum. Upon this evidence the learned judge nonsuited the plaintiff, but gave the plaintiff leave to move to enter a verdict for the sum claimed. A rule was accordingly obtained in *Michaelmas* term, against which

A. being indebted to *B.*, gave him an order upon *C.*, his (*A.*'s) tenant, to pay the amount out of the next rent that would become due. *B.* sent the order to *C.*, but had not any direct communication with him upon the subject. At the next rent day *C.* produced the order to *A.*, and promised to pay the amount to *B.*, and upon receiving the difference between that and the whole rent, *A.* gave a receipt for the whole: Held, that *B.* could not recover the amount of the order from *C.* in an action for money had and received, or upon an account stated.

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J. Williams now shewed cause. An action for money had and received could not be maintained in this case, for no money was ever received by the defendant to the use of the plaintiff or any other person. The transaction was, therefore, a mere assignment of a debt. The case of *Israel v. Douglas* (a) is distinguishable, and, indeed, *Wilson J.* there differed from the rest of the Court, and the propriety of the decision has been somewhat doubted in later cases, *Taylor v. Higgins*. (b) In *Israel v. Douglas* there was a direct communication between the parties, and a discharge of the debt due to *Delvalle*, which was a good consideration for the defendant's promise.

Cottingham contra. It was not necessary in order to support this action to prove any direct communication between the plaintiff and the defendant. All the parties consented to the arrangement. *Lythgoe* gave the order, the plaintiff received it, and sent it to the defendant, and the latter when he settled the next half year's rent with *Lythgoe*, produced the order, and promised to pay the amount of it to the plaintiff, whereupon *Lythgoe* gave a receipt for the whole rent, but allowed the defendant to retain the amount of the order. That money, therefore, became, in his hands, money had and received to the use of the plaintiff, *Wilson v. Coupland* (c), or, at all events, it may be recovered on the count upon an account stated.

BAYLEY J. The case of *Wilson v. Coupland* is very distinguishable from the present. There the defendants

(a) 1 H. Bl. 239.

(b) 3 East, 169.

(c) 5 B. & A. 228.

were

were originally indebted to *Taillasson* and Co. for money had and received, and *Taillasson* and Co. were indebted to the plaintiffs, and with the consent of all parties, it was arranged that the plaintiffs should take the defendants as their debtors. By that arrangement the demand against *Taillasson* and Co. was extinguished; and the defendants having been indebted to them for money had and received, it was held that the plaintiffs might recover in that form of action. In the present case no money was ever had and received by the defendant to the use of any person, which objection existed in *Israel v. Douglas*, and has caused the propriety of that decision to be since doubted. But there is another objection in the present case. If by an agreement between the three parties, the plaintiff had undertaken to look to the defendant and not to his original debtor, that would have been binding, and the plaintiff might have maintained an action on the agreement, but in order to give him that right of action, there must be an extinguishment of the intermediate debt. No such bargain was made between the parties in this case. Upon the defendant's refusing to pay the plaintiff, the latter might still sue *Lythgoe*, and this brings the case within *Cuxon v. Chadley*.^(a) Upon these two grounds, that the debt from *Lythgoe* to the plaintiff was not extinguished, and that the defendant has not received money to the use of the plaintiff, I am of opinion, that the count for money had and received cannot be supported; and the first objection applies equally to the count upon an account stated. The rule for setting aside the nonsuit must therefore be discharged.

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(a) 3 B. & C. 591.

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HOLBOYD J. I am of the same opinion. In *Tutlock v. Harris* (a) Buller J. puts this case: "Suppose *A.* owes *B.* 100*l.*, and *B.* owes *C.* 100*l.*, and the three meet, and it is agreed between them that *A.* shall pay *C.* the 100*l.*, *B.*'s debt is extinguished, and *C.* may recover that sum against *A.*" In *Wilson v. Coupland* the demand was originally for money had and received, and the intermediate debt was extinguished. This case differs in both those particulars, and *Cuson v. Chadley* is an authority against the plaintiff.

LITLEDALE J. I am of opinion that the nonsuit was right. Upon the facts proved at the trial this cannot be considered as money had and received to the use of the defendant. As to the account stated, it cannot be said that this was an account stated of money due and owing to the plaintiff, for it was due and owing to *Lythgoe*. Again, the original debt due from *Lythgoe* was not extinguished. In the supposed case put by Buller J. in *Tutlock v. Harris* the extinguishment of the original debt was an ingredient; and in *Com. Dig. tit. Action upon the case upon Assumpsit* (B. 3.) it is said that "the discharge of a debt is a good consideration for a promise;" and in *Wilson v. Coupland* that consideration existed. In the present case, even if the parties had met and agreed, and the debt from *Lythgoe* had been discharged, still no money having been received by the defendant to the plaintiff's use, the latter must have declared specially on the agreement, and could not have recovered in this form of action.

Rule discharged.

(a) 3 T. R. 180.

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**The Duke of SOMERSET *against* The Inhabitants
of the Hundred of MERE.**

THIS was an action on the statute 9 G. 1. c. 22. to recover a compensation for an alleged wilful and malicious destruction of property by fire, occasioned by an unknown incendiary. At the trial before *Garross B.*, at the *Salisbury Summer assizes*, 1824, the jury found a verdict for the plaintiff for 400*l.*, subject to the opinion of this Court on the following case:

The plaintiff before, and at the time of the fires herein-after mentioned, was the proprietor of *Rodmead Farm*, in the parish of *Maiden Bradley*, hundred of *Mere*, and county of *Wilts.* In *November 1820*, he let this farm by indenture of lease, for a term of seven years, to *C. and J. Large*, as joint lessees. *C. Large* was the actual occupier, and *J. Large* was joined in the lease as a security. The lease has never been surrendered. In *February 1822*, a distress was made upon the premises for rent, and shortly after *C. Large* left the farm, and never afterwards returned to occupy it. Upon his departure, *J. Large* entered upon the occupation, having purchased for 800*l.* nearly the whole of the goods

By the eighth section of the black act, which gives a remedy to any party damaged by the felonious destruction of his premises by fire, it is enacted, "that no person shall be entitled to recover damages, unless he give notice as therein mentioned, and within four days' after such notice, give in his, her, or their examination upon oath, or the examination upon oath of his, her, or their servant or servants that had the care of his or their houses, outhouses, &c. before a justice of peace, whether he or they do know the persons that committed such

fact, or any of them: Held, that where the premises consumed by fire were in the care of several servants, they ought all to have been examined.

The lessee of a farm having quitted the premises demised, in the middle of the hay harvest, the steward of the lessor, who resided at a distance of a mile and a quarter from the farm, employed and paid several persons to get in the hay, and the persons so employed had possession of the barn, and used the stables on the farm with their teams and horses. An under-steward, who lived at the distance of five miles from the farm, superintended the executive part of the work. Some of these premises having been wilfully destroyed by fire, the steward of the lessor gave in his examination upon oath before the justice: Held, that the persons who had possession of the barn, and used the stables, were the persons having the care of the premises within the meaning of the act, and that they ought to have been examined.

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upon the premises under that distress. On the 28th of *May* some person not authorized by the plaintiff claimed an interest in the premises, and took possession, and *J. Large* then acted under him. This person left the premises in a few days; and in *June* *J. Large* also departed in the middle of the hay-harvest, leaving an arrear of wages due to his labourers, when *Michael Festing*, the plaintiff's steward, who lived about a mile and a quarter from *Rodmead Farm*, in order to secure the produce, paid the labourers the arrears due to them, and under his directions, and at the expence of the plaintiff, the hay was made and housed; the executive part was looked to by one *Neate*, an under-steward, who lived at *Whitton*, five miles off. The persons so employed and paid by *Festing*, the plaintiff's steward, had possession of the barn, and used the stables on the farm, with their teams and horses. The hay having thus been harvested, on the night of the 29th of *June* a barn with three floors, a range of stables, a range of cart-houses, a range of sheds for cattle, several out-houses and pig-sties, altogether of the value of much more than 200*l.*, together with straw in the barn, the produce of the farm during the *Larges'* occupation, of the value of 45*l.*, and a threshing-machine erected by the plaintiff, were consumed by fire, which the jury found was wilfully and maliciously lighted by an unknown incendiary. Within two days after the fire, the plaintiff's steward gave to three inhabitants of *Maiden Bradley* (and there was no hamlet nearer) the notice required by the statute, and within four days after the fire gave in his examination upon oath to a magistrate of the county residing at *Westbury*, about eight or nine miles from *Rodmead*, but not

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in the hundred of *Mere*, such magistrate being the nearest that could be found by *Festing*. At the time of the fire nobody was living in the dwelling-house, which was locked up, and the *Larges* had the key.

This case was argued by *Bingham* for the plaintiff, and *Campbell* for the defendants. The principal point discussed was, whether the plaintiff, under the circumstances stated in the case, had in the premises an interest sufficient to entitle him to maintain this action. Upon that point the Court pronounced no opinion. On the part of the defendants it was also contended, that under the clause in the act of parliament requiring the examination upon oath of the servant or servants, if more than one had the care of the premises, all ought to be examined; and that in this case there had not been the examination of any of the servants having the care of the premises, but of the steward, who had the superintendence of the property. To this it was answered, by *Bingham*, that in general a steward was the person who had exclusively the care of his employer's premises, the other servants acting under his direction, and being, as well as the premises, confided to his care. Besides, it was expressly stated in the case, that *Neate* and the labourers acted only under *Festing's* direction; and that as under his direction they used the premises, the Court could not conclude that they had the care of the premises to the exclusion of, or in concurrence with the person whose peculiar province it was to take care of them, especially when, the house being locked up, neither he nor they could reside in it.

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BAYLEY J. It is unnecessary to give any opinion upon the principal point discussed in this case, viz.
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whether the plaintiff had any interest in the premises sufficient to enable him to maintain this action, because we are all of opinion that an examination on oath of the servants that had the care of the premises has not been taken as required by the eighth section of the 9 G. 1. c. 22. By that section it is enacted, "that no person or persons shall be enabled to recover any damages by virtue of that act, unless he or they by themselves, or by their servants within two days after such damage or injury done him or them by any such offender or offenders as aforesaid, shall give notice of such offence done and committed unto some of the inhabitants of some town, village, or hamlet, near unto the place where any such fact shall be committed, and shall within four days after such notice give in his, her, or their examination upon oath, or the examination upon oath *of his, her, or their servant or servants*, that had the care of his or their houses, out-houses, corn, hay, straw, or wood, before any justice of the peace, or county, liberty, or division where such fact shall be committed, inhabiting within the said hundred where the said fact shall happen to be committed, or near unto the same, whether he or they do know the person or persons that committed such fact, or any of them." The object of this clause was, that before any person should have a remedy against the hundred, there should be an examination upon oath of the servants that had the care of the houses, &c. in order that the hundred might have the best means of discovering and prosecuting the offender who committed the fact. Construing this clause, therefore, with reference to that object, it seems to me, that there ought to be an examination upon oath of the servant or servants having such care of the premises at the time of the fire, as would enable them to give to the hundred the

the best information of the circumstances attending it. In *Nesbitt v. Armstrong* (a), which was an action on the 52 G. 3. c. 150. to recover the value of premises feloniously destroyed brought against the hundred by several partners in trade, it appeared that three of them were present when the fact was committed, but one only gave in his examination upon oath without stating that to the best of his belief the others had no knowledge of the persons who committed the fact; and it was held, that that was not sufficient, but that *prima facie*, all the parties interested ought to be examined, the object of the provision being, that the hundred should obtain from all persons claiming the benefit of the act the knowledge of the facts to enable them to prosecute offenders. Now, the fourth section of the 52 G. 3. c. 150. is in terms similar to the eighth section of the 9 G. 1. c. 22. That case, therefore, applies to the construction of the words "person or persons damaged," and shews that there must be an examination upon oath of all the persons damaged, or at least that it must appear that those not examined had no means of giving the information required. Applying the same rule of construction to the words "servant or servants," it appears to me, that all the servants who have the care of premises at the time when a fire happens ought to be examined; and if some of the persons to whose care the building is committed by the owner are at a distance when the fire happens, having delegated that care to persons on the spot, it seems to me that the hundred are entitled to information from the persons on the spot, they being the persons most capable of giving the information required, and, therefore, being "the persons having the care of the premises" within the

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(a) 1 B. & A. 146

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meaning of the act of parliament. Mr. *Festing* lived at a distance of a mile and a half from the premises where the fire happened; he therefore could not give any information which could lead to the discovery of the offender. It seems to me, that it would have been more proper to examine the under-steward, who superintended the executive part of the work, for he would be more likely to know who were the persons who committed the fact. But there were persons on the farm who were employed in getting in the hay, and had the use of the barn and stables. They had a part of the care of the premises delegated to them by the steward. They were more likely than either the steward or under-steward to know who the persons were who committed the offence. It seems to me, that construing this clause of the statute with reference to the object the legislature had in view in the examination required, they were the persons having the care of the premises within the meaning of the act of parliament, and ought to have been examined; and not having been examined, I am of opinion that there was not in this case that examination on oath of the servant or servants required by the statute, and consequently that the plaintiff is not entitled to recover.

HOLROYD J. I am of opinion that neither the terms nor the spirit of this act of parliament have been complied with. Where a servant has the care of the premises he ought to be examined; and where the premises are under the care of several servants, they ought all to be examined as to their knowledge of the transaction, or it ought to be shewn that they had no means of knowledge. Here there was an examination of the
steward,

steward, who had the superintendence of the property, but neither the under-steward nor the persons who had possession of the barn and used the stables on the farm were examined. They were the persons most likely to be able to give information, and they had, to a certain degree, the care of the premises at the time when the fire happened. They not having been examined, and it not being shewn that they had no knowledge of the transaction, I think that the act of parliament has not been complied with, and, consequently, there must be judgment of nonsuit.

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LITLEDALE J. concurred.

Judgment of nonsuit.

KNOWLES and Others, Assignees of W. GILPIN,
a Bankrupt, *against* Sir A. MAITLAND, Bart.

ASSUMPSIT for goods sold and delivered by the bankrupt to the defendant. Plea, general issue. At the trial before *Abbott C. J.*, at the *London* sittings after last *Hilary* term, the jury found a verdict for the plaintiffs for 1650*l.* damages, subject to the opinion of this Court upon the following case:

A commission of bankrupt, bearing date the 1st of *April* 1819, was duly issued against *Gilpin*, under

might become due and payable unto him, the colonel, the commissioned officers, non-commissioned officers, and privates of the regiment. *A. B.* having received a sum of money from the paymaster general under this authority, afterwards became bankrupt, the colonel being then indebted to him for clothing furnished to the regiment: Held, that *A. B.* must be taken to have received the money from the paymaster general in his character of agent to the colonel, and that the latter was entitled to set off, in an action brought by the assignees, for a sum due for clothing, the monies received from the paymaster general by the agent before his bankruptcy.

By power of attorney, the colonel of a regiment appointed *A. B.* his true and lawful agent for him, and in his name to ask, demand, and receive from the paymaster general of the forces all such pay and allowances as

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which he was adjudged to be a bankrupt, and the plaintiffs were chosen his assignees. The defendant, before and at the time of the bankruptcy of *Gilpin*, was the colonel of his late majesty's forty-ninth regiment of infantry. The bankrupt, before and until his bankruptcy, was agent of the said forty-ninth regiment of infantry, having been appointed to be such agent by the defendant, as such colonel, under the usual power of attorney, bearing date the 22d of *March* 1804. *Gilpin*, before his bankruptcy, sold and delivered to the defendant goods, to and for the use of the defendant, to the amount of 1650*l.*, consisting of clothing for the forty-ninth regiment. Whilst *Gilpin* was such agent, and before his bankruptcy, he, in his capacity of such agent, received from the paymaster-general of his majesty's forces divers sums of money, exceeding the said sum of 1650*l.* and did not account for the same. The defendant did not pay the said sum of 1650*l.*, and the same was still due and owing to his present majesty.

The following is the form of the usual power of attorney by which the agent of a regiment is appointed by the colonel, and of the power of attorney from the colonel under which the agents of regiments receive money from the paymaster-general of his majesty's forces, and the form of the power of attorney under which *Gilpin* was appointed agent of the forty-ninth regiment by the defendant: "Know all men by these presents, that I, the honorable *A. Maitland*, general in the army, and colonel of his majesty's forty-ninth regiment of foot, have made, ordained, constituted and appointed, and do hereby make, ordain, constitute, and appoint *W. Gilpin*, of, &c., my true and lawful agent or attorney for me, in my name, to ask, demand, and receive, of and from the right honorable the paymaster

or paymasters-general of his majesty's forces, or of and from the paymaster or paymasters-general of the said forces for the time being, or of and from whomsoever else the payment thereof doth or may concern, all such pay and allowances as now are or may hereafter become due and payable unto me, the commissioned officers, non-commissioned officers, and private men of the aforesaid regiment, or unto the officers and men of any other regiment, troop, or company, to the command of which I may be appointed, or any other pay that is or may be due to me, either as a military or civil officer, and pay, donation, or allowance I may be entitled to from his majesty's treasury, exchequer, ordnance, or other public department, and also any prize money that I may be entitled to, of whatsoever description. And upon receipt thereof, to give and execute such acquittances and discharges as may be necessary, granting by these presents unto the said *W. Gilpin* full power and authority in the premises, as fully and effectually to all intents and purposes as I myself could or might have had if these presents had not been made, hereby ratifying and confirming all and whatsoever my said agent or attorney may lawfully do or cause to be done by virtue thereof. In witness, &c. *A. Maitland, &c.*"

A general order issued by his late majesty on the 10th of July 1760, and still in force, after reciting that a board of general officers had reported to his majesty that they had not been able to discover any better method of obviating the inconveniences which might arise upon the death of agents to regiments, than by the colonel's taking a sufficient security by a deposit of money, or by the agent vesting a sum in the public funds, in the names of trustees, applicable upon the demand of the colonel to make good any deficiency arising

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arising from the failure or death of the agent, stated, that his majesty, agreeably to the opinion of the board, must look upon the colonel as the only person accountable, not only for the pay of his regiment, the regimental funds, and other money with which the agent is usually entrusted, but also for every obstruction and inconvenience which might arise to his majesty's service from the death or failure of the said agent.

Campbell, for the plaintiffs. The defendant is not entitled to deduct the money received by *Gilpin*, either under the statute of set-off, or under the statute 5 G. 2. c. 30. s. 28., relating to mutual credit. The defendant was indebted to the bankrupt before his bankruptcy. The bankrupt was not merely agent of the defendant, but agent of the regiment by the appointment of the defendant, and as agent for the regiment of which the defendant was colonel, received a sum of money for which he had not accounted at the time of his bankruptcy. That sum so received by him constitutes a debt due from him to the crown, and not from him to the colonel. The latter was only surety for the debt of the agent, and not having paid the debt has no claim upon the estate of the bankrupt. The agent of a regiment is a public officer, accountable to the crown for all the monies he receives. Besides, he is the agent for all the individuals in the regiment, and accountable to them for the monies which he receives on account of each individual. By statute 45 G. 3. c. 58. s. 21., agents of a regiment are required to make up annual accounts, and the balance due to or from the public is to be struck, and the accounts are to be transmitted to the office of the secretary at war, and a copy to the paymaster of the forces. By

section 22., the balance admitted by the account to be due to the public, is to be considered a debt due to his majesty of record. It is clear, therefore, that money received by the agent and unaccounted for constitutes a debt due to the crown, and that payment of the money to the colonel would not discharge the agent. He, if called upon by the crown to pay it, must account to the crown. The colonel is a mere surety until the money is paid to the crown.

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Tindal, contra. The defendant is entitled under the stat. 5 G. 2. c. 30. s. 28. to claim a deduction for the money received by the agent, and unaccounted for. The agent is appointed by the colonel, and may be dismissed by him. He was the servant of the colonel, and received this money under the power of attorney, by which instrument he was authorised to receive for the colonel, and in his name, all such sums of money as became due or should become due to him from government. He is estopped by the deed from saying that he did not receive the money as the agent of the colonel. Then having so received it, a debt became due from him to the colonel, for which the latter might maintain an action for money had and received; and it would be no answer to that action to say, that the colonel had not paid the money to government. It appears clearly, by the order of 1760, that the crown looks upon the colonel only as accountable. Then, independently of the stat. 45 G. 3. c. 58., there can be no doubt that the agent owes the balance to the colonel. Does that statute make any alteration in the relative condition of the parties? It is clear, that the twenty-first section does

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not vary the relation in which the agent stood to the colonel, for that section only compels the agent to make up the accounts annually. By section 22., whenever a balance shall be admitted to be due to the public, the paymaster-general may require him to pay it into the bank, and if it be not paid, the same shall be considered as a debt on record to the crown. Before it can be considered a debt due to the crown, two things are therefore necessary under this statute; first, that a balance should be admitted to be due to the crown; and, secondly, that the paymaster-general should require the money to be paid into the bank. Now in this case no balance has been admitted by the agent to be due to the crown, nor has the paymaster-general required the same to be paid into the bank; therefore, this section does not alter the relative situation of the parties; and if no debt was due to his majesty on record, then the old debt to the colonel remained. In the twenty-fifth section there is a proviso, "that nothing therein contained shall extend to exonerate the colonel from any liability arising from any failure or deficiency of the agent." Therefore it is no answer, that the crown has not enforced the demand against the colonel. If the agent had not been a bankrupt it is clear that it would not have been an answer; the agent must have brought himself within the twenty-second section, and the assignees cannot be in a better situation than the bankrupt.

Cur. ado. vult.

On a subsequent day the judgment of the Court was delivered by

BAYLEY J. This was an action brought to recover 1650*l.* for army clothing, which had been furnished by

Gilpin, a bankrupt, (whose assignees the plaintiffs were,) to the regiment of which Sir *A. Maitland* was the colonel. The question was, whether by the 5 G. 2. c. 30. s. 28. the defendant was entitled to insist on a set-off on the ground that *Gilpin*, the bankrupt, had in his hands a much larger sum belonging to the defendant than the sum of 1650*l*. On the part of the plaintiff, it was insisted that the defendant stood merely in the character of a surety for *Gilpin*, and that until he, the defendant, had paid the money, he was not entitled to set it off. On the other hand, it was insisted that the defendant's character was not properly that of a surety but of a principal, and that *Gilpin* was to be considered as his agent, and that when *Gilpin* received these monies from government, they were received by him in the character of agent of the defendant. The relation in which *Gilpin* stood to the defendant depends, as between them, on the nature of the appointment by which *Gilpin* was constituted either the agent of the regiment or of the colonel. It may be very possible, that with reference to the public, he may stand in one relation, and with reference to the defendant he may stand in another. The legislature considers the colonel as the person to whom they have a right to look in the first instance, but when we refer to several acts of parliament, we find the agent is made not only amenable to the public, but to the different persons in the regiment for that portion of money received by him as agent, which ought to be distributed to those different persons. The statutes 45 G. 3. c. 59., and 29 G. 3. c. 50. s. 14., and the annual mutiny act, shew, that as between the public and the agent, and as between the individuals of the

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regiment and the agent, the agent is to be considered as the agent for the regiment and for the individuals; and that the agent is amenable to the public, and to the individuals of the regiment for the sums which he from time to time receives. But although these acts of parliament contemplate the agent as amenable to the public and to the individuals, we must collect in what relation the agent stands with reference to the colonel from the nature of his own appointment. Looking at the instrument executed in this case, it is not properly an appointment, but a power of attorney which passed between the parties, and it shews us in what relation they agreed to stand to each other. (The learned Judge then read the power of attorney, and proceeded as follows.) This is a common power of attorney by the colonel, treating *Gilpin* as his constituted agent, empowering him for him and in his name, to ask, demand, and receive all sums of money of whatever kind which may be due to him. It is all to find its way into the agent's hands. We think, after the agent has been constituted by such a power, it is not competent for him to convert the right of the person by whom he was appointed into that of a surety, and to consider himself in the character of principal in respect of the money received. He must be considered as agent, except so far as the interests of the public, and the individuals in the regiment, may make it improper and inconsistent with the duty he owes the public or those individuals, that the relation of principal and agent should subsist between the parties. Now in this case, so far from interfering with the interests of the public, or of any individual in the regiment, it seems to me quite

quite clear, that the allowing of the set-off in question is beneficial to the public and to the individuals in the regiment; and as between these parties, it is exactly that which the plain and common principles of justice would require. The object of the present action is, to take out of the pocket of the colonel (for certain clothing which had been provided by the bankrupt for the use and benefit of the regiment) 1650*l.*, in order that the money may be applied not to the use of the public, nor exclusively to the use of any individuals in the regiment, but to the use of the general body of creditors. And every individual in the regiment would be in the situation of a creditor, and would be entitled, as far as he had a claim on the agent's property, to a dividend, and to a dividend only, whereas the allowance of the set-off rescues this 1650*l.* from the general creditors, leaving it in the hands of the colonel, to be appropriated by the colonel to the purpose for which that money was originally issued. The means, therefore, of the colonel to answer this demand, and to make the regimental payment are bettered to the extent of 1650*l.*, if the set-off is allowed, whereas the public interests might be prejudiced if that sum of money were taken out of his hands, for he is accountable for it as a principal; it is a fund which he is bound to pay over for public purposes, or to the individuals who may have a claim on the money. But his means of paying are materially diminished if that sum of 1650*l.* is to be taken out of his pocket, and be put into the pocket of the general body of the creditors of the agent. Then what is the justice of the case as between the colonel and his agent? The agent has trusted the colonel

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with clothing to the amount of 1650*l.*, but the colonel, on the other hand, has trusted the agent with the receipt of very large sums of money to a much greater amount than 1650*l.*, for which he, the colonel, is accountable and responsible, in respect of which he does not stand to the government merely in the character of a common surety to answer for what *Gilpin* might not duly account for, but he stands in the character of principal debtor to government. Then it would be most unjust to say that *Gilpin's* creditors should be entitled to take 1650*l.* out of the pocket of the colonel, and that he should be left to pay the whole of that sum. It has been said, and rightly, that as to *Gilpin*, this does not discharge him from being called upon by government for the payment of the money. That is very true, and if he should hereafter be called upon, he would have a remedy against the colonel to the extent to which his, *Gilpin's*, estate would be made liable. But it seems to me, that he cannot require that this money should be taken out of the pocket of the colonel, unless he shews he has paid government the money, or has redeemed the colonel from that liability to which he otherwise would be subject. It appears to me, that before he demands justice he ought to do justice. I have not observed on the particular nature of this debt to *Gilpin*, but I cannot help thinking that the character of the debt is a very material circumstance: it is not a debt contracted for the purposes of the colonel, but it is a regimental debt; it is a debt contracted by him in his character of colonel to the regiment, and that money was not to be paid out of the private funds of the colonel, but out of the public money which from time to time is issued for

for the use of the regiment; and if *Gilpin* had remained solvent, the colonel would have had a right to give *Gilpin* an order for payment out of the public money. And he might have said, you are not to pay yourself for that clothing without such an order being given. The substantial justice of the case is, that the bankruptcy of *Gilpin* should make no difference in that respect, but that the colonel should be entitled to the set-off. Looking at the form of the instrument by which, and by which alone *Gilpin* was constituted the agent in this particular case, we are of opinion that the colonel was entitled to look on him as being his agent, that the money he received is to be considered as received by him to the use of the colonel, except so far as the interests of the public, or that of the other individuals of the regiment would make it inconsistent with his duty to them, that that relation should subsist between the parties. For these reasons we are of opinion that the present action cannot be maintained, and consequently a nonsuit must be entered.

Rule for a nonsuit made absolute.

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The KING against F. WING.

Where notice of appeal against an order for diverting a footway was given, and the order was not filed with the clerk of the peace for enrolment, but the justices who made it, before the next quarter sessions, gave the appellant notice that they abandoned the order: Held, that the justices at sessions had no power to award to the appellant the costs of preparing to try the appeal.

Scamble, that the right of appeal against such an order depends upon the 55 G. 3. c. 68. s. 3., and not the 13 G. 3. c. 78. s. 80.

AT a special sessions holden on the 5th of *March* 1824, in the parish of *Mildenhall*, in the county of *Suffolk*, an order for diverting a public footway was made by two justices. On the 8th of *April* following, *F. Wing* gave notice of appeal to the next quarter sessions. The order was never filed with the clerk of the peace for the purpose of confirmation and enrolment, and on the 28th of *April* the two justices gave the appellant notice that they abandoned the order. At the quarter sessions, holden on the 3d of *May*, *F. W.* applied for the costs incurred by him in preparing to support his appeal. The justices refused the application, subject to the opinion of this Court as to their power to grant such costs.

B. Andrews in support of the order of sessions. The question turns on the construction of the 55 G. 3. c. 68. s. 3. for the right of appeal is given by that statute alone. The 13 G. 3. c. 78. s. 19. is repealed by the first section of the 55 G. 3. c. 68., and the third section of the latter act gives the appeal, but does not give any power to award costs under the circumstances of this case. Even supposing no part of the 13 G. 3. c. 78. to be repealed, still it is to be observed, that it contains two appeal clauses, the nineteenth and eightieth. The nineteenth gives an appeal in cases relating to the stopping up of highways, and says nothing about costs. The eightieth, which is more general in its terms, excepts out of its operation

operation those cases in which a remedy had been provided by the former parts of the act. This was amongst those cases. Again, the eightieth section requires notice of appeal to be given within six days after the cause of appeal arises; here the order was made on the 5th of *March*, and notice of appeal was not given until the 8th of *April*: the eightieth section also requires the appellant to enter into a recognizance to prosecute the appeal; none such was entered into. The appeal, therefore, rested entirely on the 55 G. 3. c. 68. s. 3., or the 13 G. 3. c. 78. s. 19., and neither of them authorises the justices to give the costs now sought to be recovered.

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Dover contrâ. The 55 G. 3. c. 68. is merely a supplemental act, and must be construed together with the 13 G. 3. c. 78. both being made in *pari materia*. It repeals the 19th section of the preceding act, and that being removed, the general right of appeal given by the eightieth section of the 13 G. 3. c. 78. is rendered applicable to this case. Had the right of appeal depended on the nineteenth section, it must have been admitted that the justices had no power to award the costs of preparing to try the appeal, but they have such power where the appeal is under the eightieth section. [*Bayley J.* Suppose the appellant had given notice of abandoning his appeal, how could the respondents have recovered the costs incurred in preparing to resist it?] The justices have the same power of giving costs to either side.

BAYLEY J. I am of opinion that the decision of the justices at sessions was right. The order for diverting the footpath was made under the 55 G. 3. c. 68., which repealed

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repealed the 13 G. 3. c. 78. s. 19. The 55 G. 3. c. 68. s. 3. gives an appeal in certain cases; but that clause is silent as to costs. It is clear, therefore, that the justices could not, by virtue of that statute, grant to Mr. Wing the costs for which he applied. But it is said that they had power to do so under the 13 G. 3. c. 78. s. 80. The nineteenth section of that act was applicable to cases of diverting highways, and the eightieth section only gave an appeal where no specific remedy had before been provided. But supposing that exception not to exist, still that section requires notice of appeal to be given in six days after the matter complained of shall arise. That was not complied with in the present case. Neither was any recognizance entered into, which is also required by the eightieth section, and that is essential in order to entitle the appellant to costs; for, otherwise, if he failed to prosecute the appeal, the justices would have no power to give costs to the respondent. And, therefore, whether in this case the right of appeal depended on the 19 G. 3. c. 68. s. 80. or the 55 G. 3. c. 68. s. 3. is of no importance, for in neither case had the justices at sessions power to award costs to the appellant.

HOLROYD and LITLEDALE Js. concurred.

Order of sessions confirmed.

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HUGHES, Gent., one, &c., *against* STATHAM,
Gent., one, &c.

ASSUMPSIT on an agreement, whereby for certain considerations therein mentioned, the defendant (who was town-clerk of the borough of *Liverpool*) agreed to dissolve a partnership, then existing between the plaintiff, himself, and one *Foster*, to pay the plaintiff 7000*l.*, "and to use all his best endeavours, and exercise his influence to procure the prosecutions for felony, arising in the town-clerk's office," to be given, one fourth to the plaintiff, and one fourth to each of three other persons therein mentioned. Breach, that after the making of that agreement, divers, to wit, 10,000 prosecutions for felony arose in the said office of the town-clerk of *Liverpool*, whereof the defendant had notice, but would not use all his best endeavours and exercise his influence to procure such prosecutions to be divided according to the agreement, but, on the contrary, carried on the said prosecutions in his own name, and on his own behalf, and for his own benefit. Plea, general issue. At the trial before *Hullock B.*, at the *Lancaster Summer* assizes 1824, an agreement in writing was produced, which corresponded with that set out in the declaration. It was proved that the defendant was town-clerk of the borough of *Liverpool*. Held, that the agreement extended to all prosecutions "arising in the town-clerk's office," wherever they might be tried, and that letters written before the agreement was signed could not be given in evidence to shew that the parties intended the agreement to be applicable to the prosecutions at the borough sessions only. Held, also, that the defendant, as clerk of the peace of the borough, could not legally enter into such an agreement as that set out in the declaration.

Quære, Whether it would have been legal had he been town-clerk only, and not clerk of the peace.

clerk

An attorney, town-clerk, and clerk of the peace for the borough of *L.* in the county of *L.*, upon the dissolution of a partnership which had existed between him and two other persons, entered into an agreement to pay to one of them (*C. D.*) a certain sum of money, and to use his endeavours to procure for him one-fourth of the prosecutions arising in the town-clerk's office. In an action by *C. D.* on this agreement, it appeared that the magistrates of the borough of *L.* commit some offenders to be tried at the borough sessions, others at the county sessions, and others at the

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clerk of *Liverpool*, and also acted as clerk of the peace for that borough. The magistrates of the borough have power to commit, and, in fact, frequently do commit, felons, in cases where the examinations are taken in the town-clerk's office, to be tried at the assizes for the county of *Lancaster*, and at the county sessions, as well as the borough sessions. The plaintiff had always since the execution of the agreement had a full fourth of the prosecutions at the borough sessions, but the defendant had conducted for his own benefit the prosecutions at the assizes, and the county sessions. For the defendant some letters, written by the plaintiff before the execution of the agreement, were tendered as evidence to shew, that the parties intended that agreement to apply to the prosecutions at the borough sessions only. The learned Judge rejected the evidence, and being of opinion that the agreement applied to the prosecutions at the assizes and county sessions, directed the jury to find a verdict for the plaintiff. In *Michaelmas* term a rule for a new trial was moved for on the ground that the letters were improperly rejected, and that the agreement did not apply to any prosecutions but those at the borough sessions. The Court granted a rule nisi, and at the same time intimated a doubt as to the legality of the agreement, and directed that point also to be argued.

Cross Serjt., Parke, and Patteson, now shewed cause. The evidence offered to explain the agreement was properly rejected. There is no ambiguity in the terms of the agreement, and yet the evidence was offered to control and alter it, by taking out of its operation two-thirds of the subject matter, viz. the prosecutions at the assizes.

and county sessions. The letters, too, were written before the agreement was executed, and therefore cannot explain what was the intention of the parties at that time, *Countess of Rutland's case* (a), *Pickering v. Dowson*. (b) Then, secondly, the agreement, taken per se, applies to all prosecutions for felony where the examinations are taken in the town-clerk's office. Whether they are afterwards carried on at the assizes, county sessions, or borough sessions, cannot make any difference, they still *arise* in the town-clerk's office. The question of the legality of such agreements was determined in *Burn v. Guy*. (c) That case cannot be distinguished from the present on the ground that this relates to criminal prosecutions, for every prosecutor has a right to employ any person that he pleases to conduct the prosecution. The defendant, as town-clerk, has no control over the prosecutions; there is no duty on his part to see them properly conducted; his duty ceases as soon as the prisoners are committed, and the witnesses are bound over to give evidence. There is not, therefore, any thing improper in this agreement, which is merely to recommend the plaintiff to the prosecutors. The objection arising out of the defendant's situation as clerk of the peace cannot now be taken. It was not urged at the trial, and it does not appear on the record, that he is clerk of the peace: if, therefore, the decision proceeds on that ground, the plaintiff will not be able to take the opinion of a court of error. [*Bayley J.* The defendant cannot urge the objection in arrest of judgment, but it may be a sufficient ground for a new trial.] The 22 G. 2. c. 46. s. 14. cannot affect this question,

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(a) 5 Rep. 26.

(b) 4 Taunt. 779.

(c) 4 East, 190.

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unless it be made out that the defendant, being clerk of the peace, has by this agreement indirectly shared the profits of the prosecutions. But the agreement is merely that the partnership between the plaintiff, defendant, and *Foster* should be dissolved, and that defendant should pay a certain sum of money, and in future recommend the plaintiff to prosecutors. Whether that recommendation were attended to or not would make no difference to the defendant; besides, he was not enabled to give those recommendations as clerk of the peace, but as town-clerk. *Palmer v. Bate* (a) certainly decided that an assignment of the profits of the office of clerk of the peace was illegal; but here there is no bargain for any share of the profits of the prosecutions; nor has the defendant any pecuniary interest whatever in them. Independently of the statute, no objection can be made to this agreement, unless on the ground of some supposed violation of public policy. In *Mellish v. Richardson* (b) the Court of C. P. seemed to think that cases of that description have been carried quite far enough; and indeed most of those which are to be found, and which were then cited, are very distinguishable from the present. They were either cases where persons holding public situations, or having a public duty to discharge, agreed for a pecuniary consideration to exercise their offices in some peculiar mode, or to neglect that duty, as in *Collins v. Blantern* (c), *Layng v. Paine* (d); or cases of brocage of offices, as in *Morris v. McCulloch* (e), *Garforth v. Fearon* (f); or where the act done might be considered as a fraud upon third

(a) 2 B. & B. 673.

(c) 2 Wils. 347.

(e) Amb. 432.

(b) 2 Bing. 229.

(d) Wils. 571.

(f) 1 H. Bl. 327.

persons,

persons, as in *Blackford v. Preston* (a), *Card v. Hope* (b); and all cases relating to brocage of marriage, per Lord Hardwicke in *Lord Chetefield v. Jansen* (c); and several cases on this point in *Vin. Abr. tit. Marriage* (I). This contract does not fall within either of these classes, and is therefore free from objection.

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Coltman (with whom was *Alderson*) contra. The agreement, taken per se, relates to the prosecutions at the borough sessions only; and it was reasonable to suppose that the defendant would be willing to recommend the plaintiff to the prosecutors in those cases, for the defendant acting as clerk of the peace could not conduct them. If, however, the meaning of the agreement be doubtful, the letters written by the plaintiff ought to have been admitted as evidence to explain it. But the main point for present consideration is that which was suggested by the Court, viz. the legality or illegality of the agreement. It certainly relates to the prosecutions at the borough sessions, where the defendant is clerk of the peace. As to them the contract is illegal and void by the 22 G. 2. c. 46. s. 14., and being void as to part, it is void in toto. But there are great objections to the agreement in respect of the other prosecutions also. The defendant, as town-clerk, is the adviser of the magistrates in all cases that come before them, and is almost unavoidably consulted by the prosecutors; and he ought not to be fettered in giving his advice or recommendation by any such agreement as this. There are many cases where agreements not prohibited by any express enactment have been held void, as contrary to

(a) 8 T. R. 89.

(b) 2 B. & C. 661.

(c) 2 Vcs. sen. 156.

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the general policy of the law, *Cole v. Gibson* (a), *Han-
ington v. Du Chatel* (b), *Allen v. Hearn*. (c) [He was
then stopped by the Court.]

BAYLEY J. I am of opinion, as to the first point, that the letters were properly rejected. The object of them was not to shew and explain any latent ambiguity, but to contradict the plain meaning of the bargain, which was, that the defendant should use his endeavours to procure for the plaintiff one-fourth of the prosecutions for felony "arising in the town-clerk's office." I agree that the defendant was at liberty to shew that offenders were committed to be tried at various places, and then another question might be raised as to what prosecutions did arise in the town-clerk's office. I am disposed to think that the words ought to receive the larger construction, which was put upon them at the trial, but it is unnecessary to determine that point. The first two grounds for this application therefore fail. But I think that there ought to be a new trial in order that further evidence may be given by either party, as to the nature of the defendant's office, so that the effect of the 22 G. 2. c. 46. s. 14. upon this bargain may be better understood. Upon the case as it now stands, it appears to me, that the bargain was illegal. That statute, which was made to promote the impartial administration of justice, enacts, "that no clerk of the peace, or his deputy, nor any under-sheriff nor his deputy, shall act as a solicitor, attorney, or agent, or sue out any process at any general or quarter sessions of the peace to be held for any such county, riding, city, town corporate, &c.

(a) 1 Ves. sen. 503.

(b) 1 Br. Ch. Ca. 124.

(c) 1 T. R. 56.

where

where he shall execute the office of clerk of the peace, or deputy clerk of the peace, under-sheriff, or deputy, on any pretence whatsoever." If a clerk of the peace is not to be directly concerned, can he be lawfully concerned indirectly? If he cannot directly sell a recommendation, can he indirectly receive an emolument for it? If this bargain be good, why should not a temporary bargain for recommendations be good? But in such a case, by favoring those who attend to the recommendations, a clerk of the peace might make them more valuable, and so increase his profit by them in future. That certainly would be a fraud upon the statute. But, independently of that, I should feel a difficulty in saying that this bargain is legal. The town clerk is naturally consulted as to the person to be employed in conducting prosecutions, and ought to be in a situation to give unbiassed advice.

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HOLROYD J. I also think that the evidence tendered was properly rejected. It was offered to restrict the sense of the agreement taken per se. Upon the other point, I agree in thinking that there ought to be a new trial.

LITTLEDALE J. was absent.

Rule absolute.

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The KING against The Inhabitants of OXFORD-SHIRE.

Indictment against a county for not repairing a bridge in a public highway. Plea, that by a certain act of parliament for amending this road, certain trustees were directed to lay out the tolls thereby granted in repairing the roads, and were empowered to make and repair bridges; that the bridge in question was erected by the trustees under and by virtue of that act, and that the trustees were liable, and ought to repair. Replication, that the trustees were not liable to repair: Held, that the bridge being built for public purposes in a public highway, the common law liability to repair attached upon the inhabitants of the county as soon as it was built, and that the plea was clearly insufficient to exonerate them, as it did not aver that the trustees had funds adequate to the repair of the bridge.

Semble, That if that fact had been averred and proved, still the county would have been primarily liable, and must have taken their remedy against the trustees.

[INDICTMENT for not repairing a bridge in the county of *Oxford*, in a common highway leading from *Bampton*, in that county, to *Buckland*, in *Berkshire*. Plea by two of the inhabitants for themselves and the rest of the county (except the trustees under certain acts of parliament thereafter mentioned), that they ought not to be further prosecuted, because, by a certain act of the 17 G. 3., reciting that the road in the indictment mentioned passing through certain meadows and over the river *Isis*, was liable to be overflowed, &c., it was enacted, "that out of the tolls to be collected by virtue of that act, or out of the first money which should be borrowed on the credit of them, the trustees should pay the expences of obtaining the act, and should apply the remainder of the money so raised in erecting turnpikes, and amending and repairing the road, and should have power to make and keep in repair all such causeways, ditches, &c., as they should think fit; and also to build, erect, repair, and keep in repair any bridge or bridges, &c. which act of parliament was to remain in force twenty-one years." The plea then shewed that the powers of that act had been renewed from time to time, and were still in force, and then averred, that, "after the passing of the first-mentioned act, and under

and by virtue thereof, to wit, on, &c., at, &c., the trustees appointed in and by virtue of the same act, did first build and erect the said bridge in the said indictment mentioned; and from the time of the said bridge being so built and erected by them, they the said trustees hitherto have repaired and kept in repair, and have been liable to repair and keep in repair, and during all that time, and still of right ought to have repaired and kept in repair the said bridge," &c. Replication, that the trustees in the plea mentioned, from the time of the said bridge being so built as aforesaid, hitherto have not been liable to repair, &c., negating the plea. This indictment was found at the sessions and removed by certiorari. At the trial before *Park J.*, at the *Gloucester Summer assizes 1824* (in which county the trial was ordered to take place), it was agreed that a verdict should be entered for the crown, subject to the opinion of this Court, upon the facts which appeared on the pleadings. The case was now argued by

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Twiss, for the crown. It appears by the recital in the act upon which the plea is framed, that there was an old road passing *over* the *Isis*; it must, therefore, be presumed, that there was a bridge there before the erection of that which has now been indicted, and the plea does not negative that supposition. As a general principle there is no doubt that the county is liable; and in this case, for any thing that appears, the funds provided by the act may be deficient; and it is to be observed, that the repair of the bridge is not the first purpose to which they are applicable. *Rex v. Netherthong (a)* is expressly in point. Substituting *bridge* for

(a) 2 B. & A. 179.

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road and county for parish, the cases are exactly the same and from that case it appears, that if the county is to be exonerated, by reason of funds in the hands of the trustees, the existence of such funds must be shewn.

G. R. Cross, contra. There is not any case precisely like the present. In *Rex v. The West Riding of Yorkshire* (a), it did not appear, that the act then relied on gave the trustees of the road any power to build the bridge, or any funds to repair it. In the present case, power to build and funds for building and repairing are given. If those funds were inadequate, the prosecutor should have replied the fact, and ought not to have relied on the common law liability of the county. The statute of bridges (b), which is declaratory of the common law, shews, that where any other person or persons are primarily liable, the common law liability on the county does not attach. In *Rex v. Netherthong* (c) the road existed before the fund for repairing it was given, the old liability of the township, therefore, remained; but here the bridge was originally built under the provisions of the act, which also gave a fund for repairing it.

BAYLEY J. This is an indictment against a county for not repairing a bridge in a public highway. The statute of bridges shews that the burthen is *primâ facie* on the county; and it is exactly analogous to the liability of the parish to repair a road. Is there, then, any thing in the plea of these defendants to exonerate them from that liability? They cannot be exonerated without shewing a liability in some other person. The trustees under

(a) 2 East, 342.

(b) 22 H. 8. c. 5.

(c) 2 B. & A. 179.

this act were to build the bridge for public purposes. The act prevents the county from opposing the erection of the bridge, and as soon as it was built the common law liability would attach, unless the act contained some special exemption. There is no express exemption, nor any express direction that any other person shall be primarily liable. Tolls limited in amount are given, but they are made applicable to various purposes, and there is no specific direction that they shall be applied to the repair of bridges. Assuming, however, that they may be so applied, still it was necessary to allege in the plea, and prove at the trial, that the trustees had funds adequate to the repair of this bridge. Even then, I think, they would not have made out a valid defence, for the public have a right to call upon the inhabitants of the county to repair, and they may look to the trustees under the act. *Rex v. West Riding of Yorkshire* and *Rex v. Netherthong* are decisive authorities for the crown; in the former the county had the bridge forced upon them, and the latter is precisely the same with the present case, substituting only bridge for road and county for parish, as was suggested in argument. *Rex v. The Inhabitants of Kent* (a) and *Rex v. The Inhabitants of Lindsey* (b) are distinguishable; in each of those cases power was given to a canal company to destroy fords, and make, repair, and alter bridges; in each a ford had been rendered impassable, and a bridge erected by the company; the bridges so erected were for the private benefit of the company; and it was properly held, that the county was never liable to repair them. For these

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(a) 13 East, 220.

(b) 14 East, 317.

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reasons I am of opinion, that in the present case judgment must be given for the crown.

HOLROYD J. I am of the same opinion. The cases of *Rex v. Kent* and *Rex v. Lindsey* are distinguishable; there the bridges were built for private purposes, and for the private benefit of the canal owners, although when built they were useful to the public. The bridge now in question was built for public purposes, and as soon as it was built the common law liability attached. The cases which have been determined respecting highways which have been made turnpike roads, shew that the provision of a fund for the repair of a road does not exonerate a parish from their liability. The mere appointment of certain persons as trustees, to perform such duties as are imposed by this statute, does not make them liable beyond the amount of the tolls. In 1 *Lord Raym.* 725. Lord Holt says, "The inhabitants of every parish of common right ought to repair the highways; and, therefore, if particular persons are made chargeable to repair the said ways by a statute lately made, and they become insolvent, the justices of peace may put that charge upon the rest of the inhabitants." And in *Rex v. Sheffield (a)*, which was an indictment against a parish for not repairing a road, it appeared that the township within which the road was situate had, before the 19 G. 3. immemorially repaired all roads in the township. This road was made under the provisions of the 19 G. 3. c. 99., by a clause in which act the township were exempted from the repairs of any road made in pursuance of the act, and it was held, that the com-

(a) 2 T. R. 106.

mon law liability attached upon the *parish*. The principle to be extracted from all these cases is, that as soon as a public road or bridge is made, the common law liability to repair attaches upon the parish or county, and that this liability is not destroyed by the appointment of trustees, and the provision of a fund for repairs.

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LITLEDALE J. A parish as to highways and a county as to bridges are on precisely the same footing. In *Rex v. Netherthong* the inhabitants of a township (bound by prescription to repair all roads within the township) were held liable to repair a new road made in pursuance of an act of parliament, in the same manner as the present bridge; in that case the act under which the road was made contained a stronger direction as to repairs than the present. The county, in order to discharge themselves, must shew that the trustees are liable to indictment; but that, at all events, cannot be done without shewing that they have adequate funds, and no such allegation is found in the plea. But, independently of that, I think that, upon general principles, the county are liable, although there may be an auxiliary fund applicable to the repairs of the bridge,

Judgment for the crown.

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WATERHOUSE and Others against KEEN.

By a turnpike act, certain tolls were imposed upon every carriage, &c.

drawn by horses, varying in amount in proportion to the number of horses drawing the same; and certain other tolls were imposed upon waggons and carts drawn by horses; and another toll for horses, mules, or asses, laden or unladen, and not drawing; proviso, that no more than one toll should be taken from any person for passing and repassing on the same day with the same horses, beasts, and carriages through the toll gates.

A stage coach, drawn by four horses, passed through a gate erected under this act of parliament, and paid the toll. In the evening of the same day, the same coach repassed through the same gate with the same coachman but with different horses and passengers: Held, that a second toll was payable in respect of this carriage and horses.

By another clause of the act, it was enacted that no action should be commenced against any person for any thing done in pursuance of the act until twenty-one days' notice should be given to the clerk of the trustees, or after sufficient satisfaction or tender thereof had been made to the party aggrieved, or after six calendar months next after the fact committed, and that every such action should be brought in the county or place where the matter should arise, and not elsewhere, and the defendant should and might at his election plead specially, or the general issue not guilty, and give in evidence that the same was done in pursuance and by the authority of the act: Held, in assumpsit against a toll collector, brought to recover back money alleged to have been exacted by him improperly as toll, that twenty-one days' notice of action ought to have been given, and that the action should have been brought in the proper county.

ASSUMPSIT. The declaration contained the usual money counts, and the venue was laid in *London*. Plea, general issue. At the trial before *Abbott C. J.*, at the *London* sittings after *Michaelmas* term 1822, a verdict was found for the plaintiffs with 17*l.* 2*s.* 6*d.* damages, subject to the opinion of this Court on the following case.

The plaintiffs were the proprietors of the *Birmingham Balloon* coach. The defendant was the lessee of certain tolls imposed and continued by several acts of parliament passed for repairing the road from *Dunchurch* to *Stonebridge*, in the county of *Warwick*. By the 42 G. 3. the former tolls were repealed, and it was provided that the following tolls should be demanded and taken.

“For every coach, berlin, landau, chariot, calash, chaise, chair, hearse, caravan, or litter, drawn by six horses, mares, geldings, or mules, the sum of 2*s.*; and drawn by four or more horses, mares, geldings, or

mule

mules, the sum of 1s. 6d.; and drawn by two or three horses, mares, geldings, or mules, the sum of 1s.:

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"For every calash, chaise, or chair drawn by one horse, mare, gelding, or mule, the sum of 6d.:

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"For every waggon having the sole or bottom of the fellies of the wheels thereof, of the breadth of sixteen inches, the sum of 1s.; and of the breadth of nine inches, the sum of 2s.:

"For every wain, cart, or other carriage, having the sole or bottom of the fellies of the wheels thereof, of a less breadth than nine inches, drawn by six or more horses, mares, geldings, mules, or oxen, the sum of 2s.; and drawn by four or more horses, mares, geldings, mules, or oxen, the sum of 1s. 8d.; and drawn by three horses, mares, geldings, mules, or oxen, the sum of 1s. 4d.; and drawn by one horse, mare, gelding, mule, or ox, the sum of 6d.:

"For every horse, mare, gelding, mule, or ass, laden or unladen and not drawing, the sum of 1d.:

"For every drove of oxen or neat cattle, the sum of 10d. per score; and so in proportion for any greater or less number:

"For every drove of calves, hogs, sheep, or lambs, the sum of 5d. per score; and so in proportion for any greater or less number."

And it was also provided, "that no more than one toll should be demanded or taken from any person or persons for passing and repassing the same day with the same horses, cattle, beasts, and carriages, through all the toll gates or turnpikes to be continued or erected by virtue of that act, in the whole length of that part of the said road which lies between *Dunchurch* and the city of *Coventry*; but that all and every person and persons having

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having paid the said tolls shall pass and repass with the same horses, cattle, beasts, and carriages, toll free during such day through all other the toll gates or turnpikes within that division."

From the 15th of *March* 1819 to the 6th of *November* in that year, the *Balloon* stage coach drawn by four horses in its way from *London* to *Birmingham* passed through the *Ryton* gate, one of the gates erected and continued under the authority of the last mentioned act, and situate in the county of *Warwick*, between *Dun-church* and *Coventry*, at six o'clock in the morning of each and every day, when a toll of 1s. 6d. was demanded from the plaintiff's coachman and received by the collector as agent for and on account of the defendant. The same coach repassed through the same gate with the same coachman, but with different horses and passengers in its way back to *London*, at seven o'clock in the evening of each and every day on which the said toll has been so paid as aforesaid, when a second toll of 1s. 6d. was demanded by the defendant's agent, and paid by the plaintiff's coachman, after protesting against the legality of the demand.

By the 10 G. 3. one of the acts passed for repairing the said line of road, it was provided, "that no action or suit shall be commenced against any person or persons for any thing done in pursuance of this act or the said former acts until twenty-one days' notice shall be thereof given to the clerk to the said trustees, or after sufficient satisfaction or tender thereof hath been made to the party or parties aggrieved, or after six calendar months next after the fact committed; and every such action or suit shall be laid or brought in the

the county or place where the matter shall arise, and not elsewhere; and the defendant and defendants in every such action or suit shall and may at his or their election plead specially or the general issue, not guilty, and give this act and the special matter in evidence at any trial to be had thereupon; and that the same was done in pursuance and by the authority of this act. And if the same shall appear to be so done, or that such action or suit shall be brought before twenty-one days' notice shall be thereof given as aforesaid, or after a sufficient satisfaction made or tendered as aforesaid, or after the time limited for bringing the same as aforesaid, or shall be brought in any other county, then the jury shall find for the defendant or defendants. By the stat. 42 G. 3. it was enacted, that the before mentioned acts, and all and every the clauses, powers, penalties, forfeitures, provisions, matters, and things whatsoever therein contained (except such as related to exemptions from stamp duties,) should be and the same were further continued for and during the term thereafter mentioned, (twenty-one years from the 22d of June 1802).

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Dover for the plaintiff. It was unnecessary to give twenty-one days' notice of action to the clerk of the trustees, or to bring the action in the county where the matter of the action arose, for the clause in the statute requiring these things to be done, applies only to actions of tort. It enacts, that the defendant is to be at liberty to plead the general issue, *not guilty*, and that no action is to be commenced after sufficient satisfaction, or tender thereof, hath been made to the party aggrieved. It, therefore, clearly contemplates actions of tort only. In

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Irving v. Wilson (a) a revenue officer having seized goods as forfeited, which were not liable to seizure, and taken money of the owner to release them, it was held that the latter might recover back the money in assumpsit for money had and received, and that a month's notice was not necessary, and the distinction was there taken by *Grose J.*, that if an officer seize goods as forfeited, he does it *colore officii*; but if he take money for delivering up the goods, there is no pretence to say that that is done *colore officii*. In this case if the money taken was not due by law, the taking of it was not a thing done in pursuance of the act. In *Greenway v. Hurd* (b), assumpsit was brought against an excise officer to recover duties received by him after the act imposing them was repealed, and it was held that the officer was entitled to a month's notice before action brought. But in that case the question was not discussed, as the Court held the action not to be maintainable on other grounds. In *Umphelby v. Maclean* (c), assumpsit for money had and received was brought to recover the amount of an excessive charge made by the defendants as collectors on a distress for arrears of taxes, and it was held, that the defendants were not entitled to a month's notice before action brought under the statute 43 G. 3. c. 92. s. 70., which provides that no writ or process shall be sued out for any thing done in pursuance of that act till after one month's notice. In that case the taking of the excessive charge was not an act done *colore officii*. So here the taking of the toll which was not due, was not an act done in pursuance of the act of parliament. In *Wallace v. Smith* (d) Lord *Ellenborough* expressed a

(a) 4 T. R. 485.

(b) 4 T. R. 553.

(c) 1 B. & A. 42.

(d) 5 East, 115.

doubt

doubt whether, under the *London Dock Act*, the notice was necessary in an action of *assumpsit*, but the point was not decided.

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As to the other point, the defendant had no right to take the toll in respect of the same carriage and horses re-passing on the same day. In *Williams v. Sangar* (a) the toll was imposed on every carriage, and on every horse passing the gate. Every person was exempted from paying more than once a day for passing or re-passing with the same carriage or horses, and it was held that a traveller was exempted from paying a second time in the day for the passage of the same carriage, though drawn by different horses, being the same in number; and *Le Blanc J.* there observed, that by the act the duty was imposed on every carriage, and on every horse, and that it was not laid on the horses drawing a carriage but on the carriage drawn by so many horses, and that where the toll was upon the carriage it made no difference whether drawn by the same or different horses. So in this case the toll is imposed on the carriage drawn by horses. In *Gray v. Skilling* (b) the toll was precisely similar. In *Loaring v. Stone* (c) the exemption was for passing and re-passing with the same horses and carriage, and it was held that a second toll was payable in respect of a different carriage passing the same day with the same horses. But the toll was there imposed on the horses drawing the carriage, which distinguishes it from the present case. It is true that in this case the exemption is confined to persons passing and re-passing the same day with the same horses, cattle, beasts, and carriages, but in order to give full effect to the exempting clause the word *and*

(a) 10 *East*, 66.(b) 2 *B. & B.* 30.(c) 2 *B. & C.* 515.

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ought to be construed as if it was *or*, for otherwise the exemption would not extend to persons passing and repassing with the same horses, cattle, or beasts unladen.

Reader contra. The defendant was entitled to notice, and the action ought to have been brought in the county of *Warwick*. Here the action is brought in consequence of an act done by the defendant in pursuance of the act of parliament. For the defendant demanded the toll in his character of collector, and the plaintiff paid it to him in that character, under protest. In *Iroing v. Wilson* (a) the taking of the money by the custom-house officer to release the goods which he had seized, but which were not liable to seizure, was not a thing done in pursuance of the act, and therefore it was clear that notice was not necessary under the 23 G. 3. c. 70. s. 30. But in *Greenway v. Hurd* (b) it was held that an excise-officer was entitled to a month's notice in assumpsit brought against him to recover duties received by him after the act imposing them was repealed; and it was there contended that the defendant was not entitled to a month's notice, because that act extended only to actions of tort. But the Court held, that as the defendant acted as an officer of the excise when he received the money, he was entitled to notice. In *Wallace v. Smith* (c), Lord *Ellenborough's* doubt was founded entirely on the case of *Iroing v. Wilson*, which is distinguished from the present on the ground already stated. In *Umphelby v. Maclean* (d), the

(a) 4 T. R. 485.

(b) 4 T. R. 553.

(c) 5 East, 122.

(d) 1 B. & A. 42.

taking

taking of the money (an excessive charge made by the defendants as tax collectors), was not a thing done in pursuance of the act of parliament. But here, the taking of the toll was a thing done in pursuance of the act. In *Morgan v. Palmer* (a), the money was not taken by the defendant in the course of the discharge of the duty of magistrate, but for the personal benefit of the justice. Secondly, the defendant had a right to demand and take the toll. The toll is imposed on carriages drawn by horses, and the clause of exemption provides, that no more than one toll shall be demanded and taken from any person or persons for passing and repassing the same day with the same horses and carriages. Here the plaintiff has not brought himself within the exempting clause, because he did not repass with the same horses and carriage. Besides, in order to claim the exemption for repassing the gate, the plaintiff must shew that the same person repassed with the same horses and carriage. Here, the persons in the carriage were different. By the construction contended for by the plaintiff, the word *or* must be substituted for *and*. In *Williams v. Sangar* (b), the words of the exempting clause were "the same horses *or* carriage;" and it is probable, that the words of the exempting clause were the same in *Gray v. Shilling* (c), for *Dallas C. J.* seems to have considered the two cases as precisely similar. *Loaring v. Stone* (d) is substantially the same case as the present.

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BAYLEY J. There are two questions in this case: first, whether the action was properly brought; and,

(a) 2 B. & C. 729.

(b) 10 East, 66.

(c) 2 Brod. & B. 30.

(d) 2 B. & C. 515.

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secondly, whether the proprietor of the coach in question was liable to the payment of a second toll for repassing on the same day through the same gate, with the same carriage and coachman, but with different horses and passengers. Our opinion is, that the plaintiff was not bound to pay the second toll, but that he ought to have given the defendant twenty-one days' notice of action, and to have brought his action in the proper county. Acts of parliament such as those now in question must be construed with reference to the particular language in which they are expressed; but where there is any ambiguity in the language used, the construction must be in favour of the public, because it is a general rule, that where the public are to be charged with a burden, the intention of the legislature to impose that burden must be explicitly and distinctly shewn. [The learned Judge then read the clauses imposing the toll, and the clause of exemption.] The exemption applies to those cases where the same person passes and repasses; but by the same person is meant the person who pays the toll. Now the proprietor of the coach is the person who pays the toll, and he must be considered to be the person passing and repassing. If the words of the exempting clause had been "with the same horses or carriages," this case would have been governed by that of *Williams v. Sangar* (a), and *Norris v. Poate* (b). But the word is *and*, and the question is, whether that word is to be construed conjunctively or disjunctively. As a separate and distinct duty is previously imposed

(a) 10 East, 66.

(b) 3 Bing. 41.

In marginal note, p. 200. l. 38., for 'was payable,' read 'was not payable.'

In the judgment of *Holroyd J.*, p. 213. l. 2., for 'conjunctively,' read 'disjunctively.'

upon horses, upon cattle, upon calves, hogs, sheep, or lambs, which are properly denominated beasts, I think, reddendo singulo singulis, that the exemption applies to every separate thing on which the toll was previously imposed. The fair construction of the clause is, that the word *and* is not to be taken conjunctively, but disjunctively or distributively, and then the consequence will be, that if you return with the same horses, drawing the same carriage, you are to pay no toll; if you return with the same horses, mares, mules, or asses, laden or unladen, you are to pay no toll, &c.; and if you return with the same carriage, you are to pay no toll. There is nothing in the act of parliament which necessarily connects the word *carriage* with beasts. *Loaring v. Stone* (a) is distinguishable from the present case, because the toll was imposed, not upon the carriages, but upon the animals drawing; and the word *carriage* could be introduced into the clause of exemption for no other purpose but to limit the exemption to horses drawing the same carriages.

As to the other question, which is one of more general importance, I am of opinion, that under the protecting clause of the 10 G. 3. the defendant was entitled to twenty-one days' notice of action, and that the action ought to have been brought in the county where the subject matter of the action arose. It is true that many of the expressions in that clause seem to point to actions of tort, but it is material to consider the substance rather than the mere form of the action. In many cases the subject matter of the action is substantially tort, but the plaintiff may waive that tort, and bring *assumpsit*. If an

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(a) 2 B. & C. 515.

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action be brought in consequence of a thing substantially done in pursuance of the act of parliament, it is a case within the act. The words of the provision are "that no action or suit shall be commenced against any person for any thing done in pursuance of this act, or the said former acts, until 21 days' notice shall be thereof given to the clerk to the trustees, or after sufficient satisfaction or tender thereof hath been made to the party aggrieved, or after six calendar months next after the act committed; and every such action or suit shall be laid or brought in the county or place where the matter shall arise, and not elsewhere; and the defendant or defendants in every such action or suit shall and may at his or their election plead specially, or the general issue, not guilty; and give this act and the special matter in evidence at any trial to be had thereupon, and that the same was done in pursuance and by the authority of this act." The question is, whether that provision is confined to actions of tort, or extends to actions of assumpsit. The substantial part of the enactment is, that notice should be given to the trustees in order that they may tender satisfaction, and that the action should be brought promptly after the fact committed. If the act of parliament does not apply to this case, parties may be at liberty to maintain actions for all sums levied under a misconstruction of the act within a period of six years. And thus the object of the legislature, which was that the action should be brought promptly, will be defeated. But it is said that, in this case, there was not any thing done by the defendant in pursuance of the act; but that expression, as used in this act of parliament, means that the thing done should be done by the defendant acting *colore officii*; if he did so act, he is within the protection

protection of the act of parliament. I think every thing was done in pursuance of the act. First, the carriage probably was stopped at the gate, and the toll-gate keeper refused to let it pass until the money was paid. If trespass had been brought against the toll-gate keeper, for seizing one of the horses, that would have been an act done; or if an action on the case had been brought against the toll-gate keeper for stopping the carriage and horse until the toll was paid, the stopping of the carriage would have been an act done in pursuance of the act of parliament. Now can it, in substance, make any difference that the plaintiff, instead of bringing an action on the case against the agent of the defendant for wrongfully stopping the coach and horses, has thought proper to waive the tort, and to bring assumption? There are several authorities upon this subject. *Fletcher v. Wilkins* (a) does not bear on the present case, because that was an action of replevin, and a proceeding *in rem*, and was on that ground held not to be within the 24 G. 2. c. 44. s. 6. *Irving v. Wilson* (b) does not apply, because there the custom-house officer did not take the money *colore officii*; he had no right whatever to take it. *Greenway v. Hurd* (c) is an authority in point. The statute 24 G. 3. had imposed duties which the 25 G. 3. c. 24. repealed from and after the passing of that act, and they were consequently repealed with relation to the first day of the session, which was the 25th day of January 1785. In June 1785, the plaintiff positively refused to pay his duties, which, however, he paid in July following; and the action for money had and received was brought to recover back

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(a) 6 East, 285.

(b) 4 T. R. 485.

(c) 4 T. R. 553.

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that sum. The late Lord Chief Baron *Thompson*, a very able lawyer, overruled the law as laid down by *Grose J.* in *Irving v. Wilson*, and this Court afterwards confirmed his decision. In the case of *Wallace v. Smith (a)* Lord *Ellenborough* expressed a doubt whether a clause of this description applied to actions of assumpsit; but *Greenway v. Hurd* was not overruled. In *Umphelby v. Maclean (b)* the action was not in respect of any act done in execution of the office of tax-collector, but for a neglect to pay over money which he ought never to have taken. In *Morgan v. Palmer (c)* the question was under the consideration of the Court, and the reason why the statute did not apply was there pointed out; viz. that the money was not taken by the defendant in execution of his office. Upon these grounds, I think, that this action should have been brought in the county where the cause of action arose, and that the notice required ought to have been given. Our duty is to give effect to such a clause of an act of parliament, with reference not to the form of action, but to the substance of the thing done; and that being so, I think that this action is brought substantially in respect of a thing done by the defendant in pursuance of the act, and, consequently, that he is within its protection, and ought to have had twenty-one days' notice.

HOLROYD J. I agree with my brother *Bayley* on both points. The toll is laid upon carriages, and there is also a distinct toll upon horses not drawing. Then there is an exemption including the present case. If the word had been *or*, instead of *and*, the case would have

(a) 5 *East*, 122.(b) 1 *B. & A.* 42.(c) 2 *B. & C.* 729.

been

been directly within that of *Williams v. Sangar*. The words are to be construed conjunctively, and in the same manner as if the word *respectively* were in the clause. *Loaring v. Stone* is distinguishable for the reason given by my brother *Bayley*. The word carriage must have been struck out of the clause in that case, if a different construction had prevailed. But effect ought to be given, if possible, to all the words of an act of parliament. Then, as to the other point, the case of *Greenway v. Hurd*, in effect and in principle, is precisely the same as the present. With reference to the meaning of the words "*in pursuance of the act of parliament*," I think that the decision in *Greenway v. Hurd* should be abided by. The first part of the clause requires that no action shall be brought against any person or persons, &c. until twenty-one days' notice thereof shall be given to the clerk to the trustees, or after sufficient satisfaction or tender thereof has been made to the party or parties aggrieved. That shews that the protection of the act is not confined to actions where the party is justified in what he has done under the act. The question therefore is, was this action brought against the defendant for an act done in pursuance of the act of parliament, according to the legal meaning of those terms. The action in form is for money had and received to the plaintiff's use, but in substance it is brought to recover money alleged by the plaintiff to have been unlawfully taken by the defendant as toll, under colour of the authority of the act. The demanding and taking the toll was an act done in pursuance of the act. This is a case therefore within the words of the act. It is a case also within the mischief intended to be avoided by the

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1825. act of parliament. The duty is collected by the lessee. It is consistent, therefore, with the object of this enactment, if he improperly takes any toll, that he should have an opportunity of tendering amends. The same mischief would arise from the neglect to give the notice in such an action as this as if it were an action of tort. It is said that this clause applies to the case of tort, inasmuch as it speaks of the defendant's pleading the general issue not guilty, and tendering satisfaction; but I think these expressions by no means sufficient to restrain the language of the prior part of the clause, which are sufficiently large to comprehend any species of action against a toll-collector for an act done *coloré officii*. On principle therefore, as well as on the authority of the case of *Greenway v. Hurd*, I am of opinion that notice was necessary, and that the action was not brought in the proper county.

Postea to the defendants.

REEVES *against* LAMBERT.

Defendant being indebted to *A.* for goods sold, accepted a bill drawn by *A.* for the amount, which became due in October 1823. Before that time defendant became insolvent, and presented his petition to be discharged, and in his schedule delivered into the insolvent debtors' court, he stated that he was indebted to *A.* for goods, and that *A.* held his acceptance for the amount which became due in October 1823. *A.* had indorsed the bill to *B.*, but the insolvent was ignorant of that fact. *B.* having brought an action against the insolvent upon the bill, the latter pleaded his discharge under the insolvent debtors' act, and it was held that the schedule contained a true description of the person to whom the insolvent was indebted within the meaning of the 1 G. 4. c. 119. s. 6.

ASSUMPSIT by the plaintiff as indorsee of a bill of exchange dated the 11th of *October* 1822, and payable twelve months after date, drawn by one *C. Reynolds*, upon and accepted by the defendant, for 100*l.* for value received. Plea, first, general issue. Secondly, that the defendant was discharged from the promises

and

and undertakings and causes of action in the declaration mentioned by an order of the insolvent debtor's court, and that the said discharge still remained in full force. Replication, that the defendant was not discharged from the promises and undertakings and causes of action in the declaration mentioned. At the trial before *Abbott C. J.*, at the *London* sittings after *Trinity* term 1824, the jury found a verdict for the plaintiff, subject to the opinion of this Court on the following case.

In *October* 1822 the defendant being indebted to *Charlotte Reynolds* in the sum of 100*l.* for goods sold, she drew the bill of exchange mentioned in the declaration for that sum, dated the 11th of *October* 1822, at twelve months after date, upon the defendant, who accepted the same, and previous to its becoming due, *Reynolds* indorsed it to the plaintiff for a valuable consideration, and the plaintiff afterwards, and before it became due, also indorsed it to *J. Weatherley* for a valuable consideration; and on the 15th of *October* 1823 (the day after the bill became due), *Weatherley* returned it to plaintiff, it having been dishonoured by the acceptor, upon which the plaintiff paid *Weatherley* the full amount thereof, and on the 19th of *December* 1823, the present action was commenced. On the 8th of *October* 1823, the defendant was arrested by different creditors for debt, and committed to prison, and on the 15th he filed his petition in the insolvent debtor's court, and on the 28th he filed his schedule, in which was inserted the bill in question as follows: "1823. *Mrs. Reynolds*, 10, *Gough Square*, *Fleet Street*, blackworker. 100*l.* admitted. Balance for goods in her trade, she holds my acceptance for the amount due in *October* 1823." On the 15th day of *October*, notice of the

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defendant's having filed his petition, and on the 7th of *November* notice of his having filed his schedule, and of the day appointed for hearing the same, was served upon Mrs. *Reynolds*, but the plaintiff's name was no where inserted in the schedule, nor was it proved that any such notice was served upon him, the plaintiff, the indorsee and holder of the bill; nor was there any proof that the defendant knew that Mrs. *Reynolds* had parted with the bill. On the 1st of *December*, after the defendant's petition had been heard and considered by the court of insolvents, it was thereupon ordered and adjudged by the same court, that the prisoner, *Harry Lambert*, be discharged forthwith as to the several debts and sums of money due by him to the several persons named in his schedule, filed in that court and sworn to by him, respectively due or claimed to be due on the 15th of *October* last, being the time of his presenting his petition to that court, except as to the certain debts thereafter mentioned, the plaintiff's debt not being one.

The case was now argued by *Comyn*, for the plaintiff, who insisted that the defendant was not discharged as to the plaintiff's debt, because he had not in his schedule named the plaintiff as a person to whom he was indebted. It was true that he did not know that the plaintiff was the holder of the bill, but he ought to have inquired of the drawer to whom she had indorsed it. In *Baker v. Sidee (a)*, it was held that an insolvent debtor was only discharged as to a party whose claim he had noticed in his schedule.

D. F. Jones contra, was stopped by the Court.

(a) 7 Taunt. 180.

Per

Per Curiam. This act of parliament must receive a reasonable construction. The law forces no man to do impossible things, and there may be many cases where it would be impossible for a prisoner to insert in his schedule the name of the particular holder of a bill. The statute 1 G. 4. c. 119. s. 6., requires that the prisoner shall within a certain time after presenting his petition, "deliver into the Court a schedule containing a full and true description of every person to whom such prisoner shall be then indebted, or to his or her knowledge or belief shall claim to be his or her creditor." There the words, "*to his knowledge or belief*," are introduced; perhaps to distinguish debts admitted from those claimed but disputed, but if they had been omitted, it would not, therefore, follow that the legislature intended to compel the prisoner to insert in his schedule the names of all parties who claimed to be his creditors, whether he knew their names or not. That would be a most unreasonable construction, and would in many cases have the effect of preventing the discharge of the prisoner altogether. The question, therefore, is whether or not the schedule contains a description of the persons to whom the prisoner was indebted, within the meaning of this act of parliament. The prisoner knew that he was indebted to Mrs. *Reynolds* for goods sold, and that he had given her a security for the amount. That bill not having been paid, she continued his creditor for those goods. In his schedule the defendant states that he was indebted to Mrs. *Reynolds* in 100*l.* for goods in her trade, and that she held his acceptance for the amount due in *October* 1823. In fact, the plaintiff at that time was the holder of the bill, but the defendant had no knowledge of that fact. If the plaintiff had looked at the schedule he would have seen the name of
Mrs.

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 ———
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Mrs. *Reynolds* inserted in it as a creditor for 100*l.*, and that she held his acceptance for the amount due in October 1823. He would, therefore, have known that the prisoner sought to be discharged in respect of that debt for which the bill was given as a security, and he would, therefore, have had an opportunity of opposing his discharge. The prisoner in his schedule has given notice to the real creditor, for he has described the security of which she was the holder. He has, therefore, described the original debt, the original creditor, and the security for that debt. If we were to hold that this schedule did not contain a sufficient description of the persons to whom the prisoner was indebted, there might in many instances be an insuperable difficulty in the way of a prisoner's obtaining his discharge. Suppose he had made inquiry of Mrs. *Reynolds* to whom she had indorsed the bill, and she had refused to tell him; or suppose that she had told him, and the indorsee had indorsed it over to another, and refused to tell him to whom, it would have been impossible to describe the real holder of the bill. If it could be shewn that the prisoner knew that Mrs. *Reynolds* was not the real holder of the bill, the case might perhaps be different; but it is here found as a fact, that the defendant had no notice. In the case of *Baker v. Sidee* (a), the prisoner knew that *Baker* claimed to be his creditor. This case falls within the principle laid down in *Forman v. Drew*. (b) Besides, by 1 G. 4. c. 119. s. 16. the prisoner is discharged as to the debts mentioned in the schedule. Here the defendant has mentioned the original debt in his schedule, and he is discharged by force of the insolvent act as to

(a) 7 Taunt. 180.

(b) Ante, p. 15.

that

that debt, and being discharged as to that debt, he is discharged from any claim arising by reason of a security given for that debt.

Judgment for defendant.

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FRAGANO *against* LONG.

ASSUMPSIT against defendant as owner of the brig or vessel *James and Theresa*, for negligence in shipping a cask of hardware. At the trial before *Hullock B.*, at the *Lancaster* Summer assizes 1824, the following facts appeared in evidence. *Mason and Sons*, hardwaremen at *Birmingham* in *April* 1822, received an order from the plaintiff residing at *Naples*, of which the following is a translation, "*Naples, March 28th, 1822.*

Order transmitted by *G. Fragano*, of this city, to *Mason and Sons of Birmingham*, through *Mr. F. L.* for the following merchandise, to be dispatched on insurance being effected. Terms to be three months' credit from the time of arrival." The order then specified the goods. In pursuance of this order, the cask of hardware in question marked with the plaintiff's initials was sent by the canal from *Birmingham*, by *Mason and Sons*, to *Messrs. Stokes*, their shipping agents at *Liverpool*, with directions to forward the same to *Naples*. An insurance was effected, and the interest declared to be in *Fragano*. On the 3d of *July*, *Messrs. Stokes* received a notice of the arrival of the goods from the canal carrier, and sent their porter who received the goods from the

they were dispatched from *Birmingham*, and that the terms of the order did not make the arrival of the goods at *Naples* a condition precedent to *A.*'s liability to pay for them, and that he might therefore maintain an action for the injury done to the goods through the negligence of the ship owner.

carrier,

A., resident at *Naples*, sent an order to *M. and Co.*, hardwaremen at *Birmingham*, "to dispatch to him certain goods on insurance being effected. Terms, three months' credit from the time of arrival." *M. and Co.* (having marked the package with *A.*'s initials,) dispatched the goods by the canal to *Liverpool*, and effected an insurance, declaring the interest to be in *A.* At *Liverpool*, the goods were delivered by the agent of *M. and Co.* to the owner of a vessel bound to *Naples*, through whose negligence they were damaged. Held, that the property in the goods vested in *A.* as soon as

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carrier, and took them in a cart to the quay, where the *James and Theresa* was lying, and delivered them on the quay to the mate of that vessel, who gave the following receipt. "Received in good order and condition on board the *James and Theresa*, for *Naples*, one cask of hardware.

" G. F. Samuel Smith, Mate.

" From *W. and J. Stokes*."

The goods were left in the custody of the mate, and before they were actually put on board, by some accident the cask fell into the water, by which the injury complained of was sustained. Upon this evidence the jury, under the direction of the learned Judge, found a verdict for the plaintiff. In *Michaelmas* term a rule nisi for a new trial was obtained, on the ground, first, that no bill of lading having been made out, the property in the goods was never vested in the plaintiff; secondly, that by the terms of the order, the goods were not to be at the plaintiff's risk until after their arrival at *Naples*.

F. Pollock was now called upon to support the rule. The plaintiff ought to have been nonsuited in this case, for it did not appear that the property in the goods ever vested in him. The receipt given by the mate of the vessel left the goods in the power of Messrs. *Stokes*, and he would have been bound to deliver them, according to any order subsequently given by Messrs. *Stokes*, *Craven v. Ryder (a)* But no bill of lading or other document making the goods deliverable to the plaintiff was ever signed; he, therefore, never had such a pro-

(a) 6 Taunt. 453.

perty in them as would enable him to maintain this action. Then, secondly, the goods were to be paid for three months after their arrival; if they never arrived the plaintiff could never be called upon for payment; they were not, therefore, at his risk until they arrived at *Naples*.

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Crompton, contra, was desired by the Court to confine himself to the last point. That was a mere arrangement as to the time of payment, and could not prevent the vesting of the goods in the plaintiff; *Rugg v. Minett*.^(a) The order for insurance makes it quite clear that the goods were to be at his risk as soon as they left *Birmingham*.

BAYLEY J. Considering this case apart from the order given by the plaintiff, it is quite free from doubt either in law or justice. It appears, however, that the plaintiff sent an order to *Mason and Sons* at *Birmingham*, for the goods in question "to be dispatched on insurance being effected. Terms to be three months' credit from the time of arrival." But for that order the goods never would have left *Mason's* warehouse, and when sent, they were marked with the plaintiff's initials. If the goods had been destroyed by lightning on the road to *Liverpool*, *Fragano* must have borne the loss. At *Liverpool*, *Stokes and Co.*, *Mason's* shipping agents, shipped the goods and took a receipt. It is argued that the agent was thereby enabled to maintain an action for the goods, but that *Fragano* as his principal could not. I think that position is not correct, although there might

(a) 11 *East*, 210.

have

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have been some difficulty had *Stokes* and Co. set up an adverse interest. It therefore seems to me, that as the goods left *Mason's* warehouse by the order of the plaintiff, they were at his risk, and that he can maintain an action for them, unless the form of the order which he gave for them deprives him of that right. It has been urged, that the form of the order throws the risk upon the vendor until the arrival of the goods, for they were not to be paid for until three months from that period, and consequently that the arrival was a condition precedent to *Mason's* right to sue for the price. If, however, the goods were not to be paid for unless they arrived, why should the plaintiff insure them? That shews that the arrival was not considered as a condition precedent to the payment. If the goods arrived, three months from the arrival was to be the period of credit; if they did not arrive, still the plaintiff would be bound to pay in a reasonable time after the arrival became impossible. If this were not so, the insurance would be altogether nugatory, for *Fragano* could not sue upon it, neither could *Mason*, the interest being declared to be in *Fragano*. For these reasons, I am of opinion that the form of the order for the goods does not vary the case, and that the verdict was properly found for the plaintiff.

HOLROYD J. I also think that the verdict found for the plaintiff was right. It has been argued that neither the mate nor the owner of the vessel was liable to any one but *Stokes* and Co., from whom the goods were received. But it is a principle of law, that the real owner of the goods, for whom *Stokes* and Co. were agents, may sue for the loss, although the defendant was not informed

formed of his existence. Then it has been urged that *Fragano* had no interest in the goods, and the terms of the order have been adverted to in support of that argument; but I think that the goods became his property as soon as they were sent off by *Mason and Co.* When goods are to be delivered at a distance from the vendor, and no charge is made by him for the carriage, they become the property of the buyer as soon as they are sent off. It was next contended that *Fragano* was not liable to the vendor unless the goods arrived; but the order for insurance is decisive as to that. The policy was to protect *Fragano*, and shews that he considered he should be the sufferer if the goods were lost on the voyage, which he could not have been had the arrival of the goods been a condition precedent to his liability to the vendors. The expiration of three months was to be the time of payment if the goods arrived; if they did not arrive the law would imply a promise to pay in a reasonable time.

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LITTLEDALE J. concurred.

Rule discharged.

MORETON against HARDERN and Two Others.

CASE. The first count alleged that the plaintiff on, &c., was passing along a public highway, at, &c., and that defendants were then and there possessed of a coach and certain horses drawing the same, which were carelessly managed their coach and horses, that the coach ran against the plaintiff and broke his leg. It appeared in evidence that one of the defendants was driving at the time when the accident happened, and the jury found that it happened through his *negligent* driving: Held, that the plaintiff might maintain *case* against all the proprietors, although he might perhaps have been entitled to bring trespass against the one that drove the coach.

Case against
three defend-
ants, proprie-
tors of a stage-
coach. The
declaration
stated that the
defendants so

under

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against
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under the care and management "of a certain then servant of the defendant's," who was driving the same. Nevertheless, the said defendants, by their said servant, so carelessly and negligently drove the coach and horses, that the wheels ran with great force against the plaintiff, whereby one of his legs was broken, &c. The second count stated that the coach was under the "care and management of the defendants." Plea, general issue. At the trial before *Warren C. J.*, of *Chester*, at the last Summer assizes for that place, it appeared that the defendants were proprietors of a stage-coach travelling from *Congleton* to *Manchester*. The plaintiff, at the time when the accident happened, was driving a cart along the high road. The coach was driven by the defendant, *Hardern*, and the coachman employed by the proprietors to drive was sitting by his side. The coach ran against the defendant, and thereby caused the injury stated in the declaration. It did not appear that *Hardern* saw the plaintiff at that time. For the defendants it was objected, that the first count was not proved, inasmuch as the coach was driven by one of the defendants, and not by their servant; and that the second count could not be sustained, for that the injury being immediate, and occasioned directly by the act of one of the defendants, the action should have been trespass and not case. The learned Judge reserved these points, and left the case to the jury, who found a verdict for the plaintiff, damages 200*l.*, and that the accident was occasioned by the negligence of the defendant, *Hardern*. A nonsuit was thereupon entered, and the plaintiff had leave to move to enter a verdict in his favor for 200*l.* A rule nisi for that purpose was obtained in *Michaelmas* term, against which

Temple

Temple now shewed cause. It is quite clear that the evidence did not support the first count of the plaintiff's declaration. That count alleged that the coach was under the care and management of a servant of the defendant's. Now it appeared that it was driven by one of the defendants, and not by the coachman, who was sitting on the coach at the time. With respect to the other question, it is only necessary to cite *Leame v. Bray* (a) and *Lotan v. Cross* (b), which are expressly in point, and conclusive in the present case.

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Moynan
against
Hardern.

J. Williams (with whom was *D. F. Jones*) contra. It will not be necessary for the Court to express any opinion respecting the doctrine advanced in *Leame v. Bray* and *Lotan v. Cross*, or any of the cases which say that a direct and immediate injury is properly the subject of an action of trespass. Both the counts of this declaration were sustained by the evidence. As to the first, it appeared that the coachman employed by the defendants jointly was sitting on the box by the side of *Hardern*; he, therefore, had in law the management of the coach, and in fact also, for he might at any time have resumed the reins. But if that be not so, still this is an action of tort, and the plaintiff may recover against any one or more of the defendants. Now in the other defendants it was gross negligence to suffer *Hardern* to drive, he not being the proper person to do so. The second count, therefore, which alleges the accident to have happened through the negligence of the defendants, was clearly established, and the jury found that the plaintiff was injured through the negligence of *Hardern*, and not

(a) 3 East, 593.

(b) 2 Camp. 464.

1925. by his wilful act. Case was, therefore, the proper form of action against all the defendants.

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against
HARDERN.

BAYLEY J. I am of opinion that this rule must be made absolute. The second count of the declaration alleges that the defendants were possessed of a certain coach and horses, which were under their care and management, and that they so carelessly and improperly governed and directed the said horses and coach, that through their carelessness, negligence, and improper conduct the coach ran against the plaintiff, and injured him. The objection made to that count was, that as one of the defendants was driving, the injury was immediate, and that, consequently, the action should have been trespass, and not case. It is a sufficient answer to say, that the plaintiff had a right to sue all the defendants, and that trespass clearly would not lie against them all. Such an action might perhaps have been maintained against *Hardern*, but not against the other defendants. It was long vexata quaestio whether an action on the case could be brought when the defendant was personally present and acting in that which occasioned the mischief. Early in my professional experience case was the form of action usually adopted for such injuries. In Lord *Kenyon's* time a doubt was raised upon the point, and he thought that where the act was immediately injurious, trespass was the only action that could be maintained for that injury. *Leame v. Bray* was an action of trespass. At the trial Lord *Ellenborough* thought it should have been case, but on further consideration this Court was of opinion that trespass was maintainable, but they did not decide that an action on the case would have been improper. Looking at the other cases on the subject

subject it is difficult to say that an action on the case will not lie for an injury sustained through the negligent driving of a coach, although one of the proprietors was the person guilty of that negligence. In *Ogle v. Barnes and Others* (a), which was a case for negligently steering a ship, the declaration alleged that the ship was under the care of *Barnes*, one of the defendants, and of certain servants of the defendants, and that through their negligence the injury was sustained, and it was never urged that the action should have been trespass and not case, because one of the defendants was on board, but on the ground of the injury being immediate. In *Rogers v. Imbleton* (b) (which was decided after *Leame v. Bray*), it was alleged that the defendant was driving a cart, and took such bad care of the cart and horse, that it ran with great force against the plaintiff's horse. To that there was a demurrer, upon the authority of *Leame v. Bray*, the action being in case, but the Court was clearly of opinion that case would lie, and the demurrer was over-ruled. In *Huggett v. Montgomery* (c), although the defendant was on board, yet the ship was not under his immediate care and management, but under that of a pilot, and on that ground case was held to be the proper form of action. It is not necessary to say that trespass could not, in this case, have been sustained against *Hardern*. No doubt that action lies when an injury is inflicted by the wilful act of the defendant, but it is also clear that case will lie where the act is negligent, and not wilful. Here the report says, that the injury was occasioned by the negligent driving of the defendant *Hardern*. I think, there-

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against
HARDERN.

(a) 3 T. R. 188.

(b) 2 N. R. 117.

(c) 2 N. R. 446.

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 MURKIN
 against
 HARDEN.

fore, that as the plaintiff had a right to sue all the proprietors of the coach, and as trespass would not lie against them all, case was the proper form of action to be adopted.

HOLROYD J. I think that the nonsuit in this case cannot be supported. In cases where there is no ground of action, except the trespass, perhaps case will not lie; but where an actual damage has been sustained, the trespass may be waived, and an action is maintainable on the special circumstances of the case, as in *Pitts v. Gaince*. (a) In trover the conversion may be the actual taking of the goods, yet there the trespass may be waived, and in other cases that which is an aggravation of the trespass may be the subject of an action on the case. Here there was a ground of action independent of the trespass, even supposing that such an action could have been maintained, upon which I give no opinion. The real ground of action is the negligence of *Hardern*. It is brought against all the proprietors. They are all responsible for the person appointed to drive, whether the person be or be not one of themselves. They are answerable as the owners of the coach and horses. Trespass might lie against the driver by reason of his doing the particular act; but still there would be a ground of action against his co-proprietors, and that could only be an action on the case, for they are not by his act made co-trespassers. If case lies against them, it lies against him also as a joint proprietor, if a ground of action remains after the trespass has been waived.

(a) 1 Salk. 10.

LITLEDALE J. I think that an action on the case was maintainable against the defendants, and it is not necessary to give any opinion as to the plaintiff's right to bring trespass against the proprietor who was driving when the injury was done. It is clear that case lies against the other two, and, as to him, I think all doubt is removed by the report of the learned judge, by which it appears the jury found the injury to have been occasioned by his negligent driving. The declaration alleged the injury to have been occasioned by negligence, as in *Ogle v. Barnes*; and there a motion in arrest of judgment having been made, the Court said, they would *intend* the injury to have been done by negligence, and discharged the rule. Here the cause of the injury is expressly stated to have been negligence. In *Ogle v. Barnes*, *Lawrence J.* puts the question on a very reasonable ground; he states that it is properly a question of evidence whether the act was wilful or negligent. Here the defendant *Hardern* may, at the moment, have done all in his power to avoid the accident, but may have been unable to do so in consequence of antecedent negligence, and it being found that the plaintiff sustained the injury in consequence of his careless driving, that sustains the present form of action. The rule for entering a verdict in favor of the plaintiff must therefore be made absolute.

Rule absolute.

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against
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The KING *against* The Inhabitants of CHEDISTON.

The pauper who rented a farm in *C.* assigned it to *P.* upon trust, to cultivate it and pay the pauper's debts, &c. The lease expired in 1817; no settlement of accounts took place, but *P.*, without the authority of the pauper, then hired a house in *H.* at the yearly rent of 18*l.*, to which the pauper and his family removed, and they resided there for more than two years. The pauper never paid any rent or taxes, but *P.* was rated, and paid the rent and taxes: Held, that the pauper gained a settlement in *H.* by the occupation of the house.

The owner of the house died before the appeal was heard, and a witness proved a declaration made by him during the period when the pauper occupied the house, that he had let it to him, and that *P.* had guaranteed the rent.

Quære, Whether this declaration was properly received in evidence?

UPON an appeal against an order of two justices for the removal of *T. Squire, Elizabeth* his wife and eight children, from the parish of *Halesworth*, in the county of *Suffolk*, to the parish of *Chediston* in the same county, the sessions confirmed the order subject to the opinion of this Court on the following case. The pauper *Squire* (whose original settlement was admitted to be in *Chediston*, and who occupied a farm there in 1809, at an annual rent of 300*l.*) assigned over his farm for the remainder of his term, together with his farming stock and crops, to his brother-in-law *J. Page*, upon trust to cultivate the farm during the remainder of the term, and at the expiration of the lease to sell the stock and crops for the payment of his, the pauper's, debts; and then upon trust to pay over the balance, if any, to him. *Page* acted under the trusts of this deed until *Michaelmas* 1817, when the lease expired, but no final settlement of accounts took place, and nothing was paid to the pauper, his property, as stated by *Page*, not being sufficient to pay his debts. At *Michaelmas* 1817, *Page*, not having any authority from the pauper to do so, and without his knowledge, hired a house in *Halesworth*, of the value of 18*l.* a year, of one *Hinesby* (since deceased), in which *Squire* and his family resided. Some of the furniture belonged to *Squire* and some to *Page*. The

house

house was much larger than was required by *Squire*, and was taken by *Page* because he could not procure a smaller one. *Squire* never paid rent for the house, nor parish rates nor taxes; they were all paid by *Page*, who was assessed in the parish rate, and in the tax collector's assessment for the house. The pauper and his family continued to reside in the house till *Christmas* 1819, when *Page* without any notice directed the pauper and his family to quit the house, which they did. *Page* stated that he considered *Squire* responsible to him for the rent, but when he (*Page*) hired the house he did not think he should get the rent. It was also proved by a witness, that in the course of a conversation which he had with *Hinesby*, the deceased owner of the house, *Hinesby* stated that he had let his house to *Squire*, and that upon witness expressing some doubts as to *Squire's* responsibility, *Hinesby* told him that the rent was guaranteed by *Page*. This evidence was objected to by the counsel for the respondents, but was admitted by the Court.

1825.

The King
against
The Inhabit-
ants of
Chesham.

Marryat (with whom was *Alderson*) in support of the order of sessions. It will be urged on the other side, that the pauper gained a settlement in *Halesworth* by the occupation of the house in that parish. That occupation, however, will not suffice unless it can be shewn that he had the legal possession of that house. Now *Page* had no authority to hire it for the pauper, nor did he, in fact, do so. *Page* was rated for the house, *Squire* paid neither rent nor taxes, and quitted when ordered to do so by *Page*, without any previous notice, he was therefore a mere inmate of *Page*. In *South Sy-*

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ants of
Cammeron.

denham v. Lamerton (a), *Parker* C. J. certainly expressed an opinion, that an occupation permitted through charity would confer a settlement, but that was extrajudicial and quite unnecessary to the decision of the case. In all the other cases upon the subject, there has been either a right of possession or something in the nature of a render. In *Rex v. Fritwell* (b), the owner of the tenement received no money payment, but he had the manure made by the pauper's cattle. In *Rex v. Fillongley* (c) the pauper had sown the land, and on that account, according to the opinion of *Buller* J., could not be turned out. *Rex v. Netherseal* (d) and *Rex v. Culmstock* (e) proceeded on the ground that the pauper had the legal occupation of the tenement. In *Rex v. Hooe* (f), it was found as a fact that the pauper took the tenement, and that was relied on by Lord *Ellenborough*. Here, the pauper did not take the house, the agency of *Page* is negatived by the case, and without lawful possession by the pauper as tenant, a settlement cannot be gained, *Rex v. South Lynn*. (g) This case resembles *Rex v. St. Michael in Coventry* (h), where the pauper lived in a house by the permission of the tenant, and not as tenant, and it was held not to be such an occupation as could confer a settlement.

Dover contra. If the declarations of *Hinesby* were properly received in evidence, they are decisive of this case, for they shew that the house was let to the pauper. Now those declarations were clearly against *Hinesby's*

(a) 1 Str. 57.

(c) 1 T. R. 458.

(e) 8 T. R. 780.

(g) 5 T. R. 664.

(b) 7 T. R. 197.

(d) 4 T. R. 258.

(f) 4 East, 362.

(h) 15 East, 567.

interest

interest at the time when he made them, and were therefore admissible. But if they are rejected, still sufficient appears in the case to shew that the order of sessions was wrong. It is clear that *Page* did not take the house for his own occupation. If he took it on his own account, and then put *Squire* into it, that would make *Squire* his undertenant; if *Page* took the house as agent, then *Squire* was tenant to *Hinesby*, and in either case a settlement would be gained. It is said that *Page* had no authority to hire the house for *Squire*. That is true, but subsequent assent supplies the defect in the authority, and that assent is proved by *Squire's* long continued occupation. *Re v. Fillongley* clearly shows that a lawful occupation is sufficient, whether any payment of rent or contract for rent be or be not made. (He was then stopped by the Court.)

1835.

The King
against
The Defendant.
on a writ of
Habeas Corpus.

BATHE J. It appears to me on this state of facts that there was a sufficient coming to settle on a tenement in the parish of *Halesworth* to give the pauper a settlement in that parish. The assignment to *Page* dispossessed the pauper of all right to reside on the farm, and gave *Page* the complete control over it. Under these circumstances *Page* took the house in question, clearly not for his own purposes but as a residence for the pauper, who removed to it with his family. It is stated, indeed, that the house was larger than *Squire* wanted, and that *Page* put some of his own furniture into it, but *Squire* had the exclusive occupation; and whether *Page* hired the house as agent for *Squire*, or whether he hired it for himself and underlet to *Squire*, still the latter was tenant. There may be a difficulty in saying that *Page* was agent; but then it is clear that *Squire* was tenant

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—
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against
The Inhabit-
ants of
Cotswold.

tenant at will to him, and *Rex v. Fillongley* (a) and *Rex v. Lakenheath* (b) are decisive authorities that such a tenancy is sufficient to confer a settlement. In the latter of those cases *Abbott* C.J. says, that the pauper gained a settlement, because he occupied in his own right, and not as a servant. Here *Squire* clearly occupied in his own right, for *Page* took the house expressly as a residence for *Squire* and his family.

HOLROYD J. I am of opinion that a settlement was gained in *Halesworth*. The pauper occupied the house there by the permission of *Page*, who hired it for that purpose. That occupation continued upwards of two years, and had a burglary been committed in the house during that period it must in an indictment have been described as the dwelling-house of *Squire*; the case contains no statement of any occupation by *Page*. *Squire* might have maintained trespass if his possession had been invaded; that makes him at least tenant at will to *Page*; and then *Rex v. Fillongley* and *Rex v. Lakenheath* are in point. It is said, that in the former the pauper could not be turned out, because he had sown the land; but it appears that he had sown it with his brother's corn; it is therefore difficult to understand how that could vary his rights, and no such argument can be urged against the authority of *Rex v. Lakenheath*. The order of sessions must, therefore, be quashed.

LITLEDALE J. concurred.

Order of sessions quashed.

(a) 1 T. R. 458.

(b) 1 B. & C. 531.

1825.

GREEN, Executrix of DANIEL BOAZ, deceased,
against DAVIES.

ASSUMPSIT on a promissory note for 100*l.*, dated the 23d of *December* 1814, payable to *Daniel Boaz*, with lawful interest. Pleas, general issue, and the statute of limitations. At the trial before *Park J.*, at the *Summer assizes* for the county of *Stafford* 1824, the plaintiff produced in evidence the following instrument: "*December 2, 1814. Received of Mr. Boaz 100*l.*, which I promise to pay, with lawful interest,*" and proved the hand-writing of the defendant to it. The note had upon it a three-penny receipt stamp, and a *1*l.** agreement stamp, and on the back of it there was a receipt for a penalty of *5*l.** and the *1*l.** duty. It was further proved that about two months before the trial, application was made to the defendant on the part of the plaintiff to send her a little interest of her money, to which the defendant replied, "he was thinking about the old lady and that she would be wanting some, and that on the *Sunday* he would bring her some interest of her money." It was proved that no interest had ever been paid. It was objected, on the part of the defendant, that

An instrument in the following form: "Received of *A. B.* 100*l.*, which I promise to pay on demand, with lawful interest," is a promissory note.

In assumpsit by an executrix on a promissory note for 100*l.*, made in 1814, and payable to her testator, and for money had, &c., it appeared on the production of the note that it had a three-penny receipt stamp and a one pound agreement stamp, and there was indorsed upon it a receipt for a penalty of *5*l.** and *1*l.** duty. The proper stamp for such a note in 1814 was a three

shilling stamp: Held, that as it appeared upon the face of the note that it had been issued without having affixed to it a stamp equal in amount to that required by law, the commissioners had no power after it had been issued to affix to it another stamp, and, therefore, that it was not receivable in evidence, either in support of the count for the promissory note or of the money counts.

The defendant, on being applied to by the plaintiff for payment of interest, stated that he would bring her some on the following *Sunday*: Held, that although this was an admission that something was due, still as it did not appear what the nature of the debt was, or that it was due to the plaintiff as executrix or in her own right, or that it was one for which assumpsit would lie, the plaintiff was not entitled to recover even nominal damages, and a nonsuit was entered.

the

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the note was not receivable in evidence, because it had not a three shilling stamp as required for a promissory note of this description by the 48 G. 3. c. 149. which was the stamp act in force at the time when the note was made. The learned judge reserved the point, and the plaintiff had a verdict for the amount of the note and interest, with liberty for the defendant to move to enter a nonsuit. A rule nisi having been obtained for that purpose in last *Michaelmas* term,

Russell and *Whately* on a former day during these sittings shewed cause. The instrument in question is not a promissory note, inasmuch as no payee is named in it. It is a writing containing an acknowledgment of a debt, and, therefore, receivable in evidence without a stamp. *Israel v. Israel* (a), *Fisher v. Leslie*. (b) It is a mere accountable receipt like the instrument in *Rowcroft v. Lomas*. (c) But, secondly, assuming it to be a promissory note, there was a sufficient stamp upon the note at the time when it was produced in evidence, and that was sufficient. *Firbank v. Bell* (d), *Butts v. Swan* (e), and *Rowcroft v. Lomas* will be relied on to shew that this instrument does not amount to an agreement. But that is immaterial, for by the 55 G. 3. c. 184. s. 10. it is enacted, "that all instruments for or upon which any stamp or stamps shall have been used of an improper denomination or rate of duty, but of equal or greater value in the whole with or than the stamp or stamps which ought regularly to have been used thereon shall nevertheless be deemed valid and effectual in the law; except in cases where the stamp or

(a) 1 *Camp.* 499.(b) 1 *Esp. N. P. C.* 426.(c) 4 *M. & S.* 457.(d) 1 *E. & A.* 36.(e) 2 *Brod. & B.* 78.

stamps used on such instruments shall have been specially appropriated to any other instrument, by having its name on the face thereof." Now this clause is retrospective as well as prospective, for the words are, "*shall have been used.*" Then the only question is, when an instrument is produced in evidence, whether the stamp affixed to it at that time be of greater value than that required by law? [*Bayley J.* Upon the face of the note it appears to have had a three-penny receipt stamp in the first instance, and there is indorsed on the back of it a receipt for a penalty of 5*l.*, and the 1*l.* duty for the agreement stamp. It appears, therefore, that the bill was issued with an improper stamp on it, and having been so issued, had the commissioners any power to affix another stamp?] There was not any proof as to the time when the stamp was affixed. Besides *Wright v. Bayley* (a) is an authority to shew that the Court will not enquire when an instrument was stamped, provided it has the proper stamp affixed to it when produced in evidence.

Tamton contra. The instrument in question was a promissory note, and having been made in 1814, ought, before it was issued, to have had affixed to it a three shilling stamp as required by the 48 G. 3. c. 149. sched. part. 1. for a promissory note of this amount. *Chadwick v. Allen* (b) is expressly in point to shew that it is a promissory note, and if it be so, then the commissioners had no power to restamp it after it had been once issued with a stamp of less value than that required by law. That appears clearly by reference to the several

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 GARR
 against
 DAVIES
(a) *Peake's N. P. C.* 173.(b) 2 *Str.* 706.

stamp

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stamp acts. The 31 G. 3. c. 25. s. 19. directs the commissioners to stamp the paper before the thing charged is written thereon, and not after. The 37 G. 3. c. 136. s. 5. authorizes them to stamp notes after they are written, provided they are written upon stamps of a *proper* amount but of wrong denomination. By the 48 G. 3. c. 149. s. 8. the powers and provisions of former acts as to the duties were to be put in execution as to the duties by that act imposed, and by section 11. the issuing a note *unless* duly stamped, subjected the party to a penalty of 50*l.*; and this latter act was in force at the time when the instrument in question was made; and it appears by the indorsement, that it was issued with a stamp of a less amount than that required by law. The commissioners, therefore, had no power to affix any other stamp. The 55 G. 3. c. 184. s. 10. does not apply, because it was not in force at the time when the instrument was issued. In *Butts v. Swann (a)*, the instrument was an order for payment of money, which, in the stamp acts, are put on the same footing as bills or notes. It had no stamp upon it when it was written, but it was stamped with a *1*l.** agreement stamp at the time when it was produced at the trial, and that was held to be insufficient.

Cur. adv. vult.

The judgment of the Court was now delivered by BAYLEY J. This was an action upon a note, and the question was upon the sufficiency of the stamp. The note was in this form: "*December 1814. Received of Mr. D. Boaz, 100*l.* which I promise to pay on demand, with lawful interest.*" It was upon a three-penny re-

(a) 2 Brod. & B. 78.

ceipt stamp and a 1*l*. stamp. It was urged first, that this was not a note, no payee being named, and if not, that no stamp was necessary. Secondly, that these stamps were sufficient. Thirdly, that the instrument might be read as evidence of an account stated. Fourthly, that the promise proved against defendant that he would bring plaintiff some interest, was an admission that something was due, and would entitle plaintiff to a verdict for at least nominal damages.

As to the first point, of that there can be no doubt; no particular form of words is necessary to constitute a note, and *Chadwick v. Allen* (a) is in point to shew that it is not necessary to name the payee more explicitly than this note does; the substance of the note there was, "15*l*. 5*s*. balance due to Sir *Andrew Chadwick*, I am still indebted, and do promise to pay." Whom he was to pay was not in terms stated, but as no other payee was named, who but Sir *A. Chadwick* could be the object of his promise? So here, as the money was received from *Boaz*, he alone could be the person to whom the money was to be paid back.

Then as to the sufficiency of the stamp, as this note was dated *Dec.* 1814, it is to be considered with reference to the acts then in force and to such subsequent acts, if any, as are applicable to it. The act then in force was the 48 G. 3. c. 149., and upon such a note the stamp under that act would have been a 3*s*. stamp. The issuing such a note, unless the same was first duly stamped, subjected the party under section 11. to a penalty of 50*l*. By section 8. the powers and provisions of former acts as to former duties, were to be put in execution as to the duties by that act imposed. One of the provisions as to former duties, was imposed

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 against
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(a) 2 Str. 706.

by

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Garra
against
Harris

by the 91 G. 3. c. 25. s. 19. That provision was, that the commissioners should stamp the paper before the thing charged; *i. e.* the note, &c., should be written thereon, that no note should be given in evidence, or admitted to be good, useful, or available in law or equity, unless the paper on which it was written, was marked with a stamp denoting the duty or some higher rate or duty in that act contained; and that it should not be lawful for the commissioners to stamp any paper with any stamp directed by that act, after such note was written thereon. This provision was so far altered by the 27 G. 3. c. 136. s. 5. as to warrant the stamping notes after they were written; if they were written upon stamps of a proper amount, but of wrong denomination, but not otherwise, and subject to that alteration, it was in force at the time when this note was given. This note, therefore, was originally upon a wrong stamp, and no stamp, as the law then stood, could lawfully be put upon it. The 11. stamp now impressed upon it would not have been available (see 49 G. 3. c. 127. s. 6.; *Farr v. Price*, 1 East, 55.; *Taylor v. Hague*, 2 East, 414., and *Chamberlain v. Porter*, 1 N. R. 30.), and it remains to be seen whether any alteration in the law has since been made, which will remove the objection. The only statute which has made any alteration is the 55 G. 3. c. 184., and the only provision in that act which bears upon the question, is section 10., which enacts, that where stamps had been used of an improper denomination or rate of duty, but of sufficient amount, the instrument should be deemed valid and effectual, unless the stamp used were specially appropriated to some other instrument, by having its name on the face thereof. It was urged upon the argument, that this clause was retrospective as well as prospective;

spective; that it would apply to instruments made prior to that act, as well as to instruments made since, and that so as the instrument had a stamp upon it at the time it was produced upon the trial, an inquiry as to when it was put on was inadmissible; and that as this instrument had upon it at the time it was produced a 1*l*. stamp, which had no name upon the face of it, it was within the operation and protection of this clause. Whether the clause in the 55 G. 3. be retrospective as well as prospective, it is not necessary now to decide, because we are of opinion that an inquiry as to the time when the stamp was put on is admissible, and that as this note carries upon it a minute as to the time when the 1*l*. stamp was imposed, and was produced by the plaintiff with that minute upon it, at the time of the trial, we are bound to consider it as a note which had not a stamp of sufficient amount at the time it was issued; and that under the prohibition in the 31 G. 3. the 1*l*. stamp was improperly added, and does not remove the objection on account of the original want of stamp. The case of *Butts v. Swann* (a) is an authority upon this point. There the instrument was an order for payment of money, which is put by the stamp acts upon the same footing in this respect as bills or notes. It had no stamp upon it when it was written, but it was stamped with a 1*l*. agreement stamp at the time of the trial. It may be inferred from the case, though it is not distinctly stated, that the stamp was not specially appropriated to agreements, because if it had there could have been no argument upon that point;

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(a) 2 Brod. & Ding. 78.

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and the Court decided that as the instrument had not the proper stamp upon it when it was written, the subsequent addition of a stamp could not make it valid. *Dallas C. J.* said, it is admitted that if this instrument constituted a bill of exchange it could not be stamped after it was first issued, and *Richardson J.* refers to the 31 G. 3. to establish that point. The case before Lord *Kenyon* of *Wright v. Riley (a)* is quite different. There, though the bill was stamped after it was drawn, which was improper, it was stamped with a regular bill stamp. There was nothing upon the face of the bill to shew that it had not had that stamp upon it at the time it was issued, and the bill was a negotiable bill, and in the hands of an indorsee, and there was nothing to shew that the plaintiff took it before it was stamped. We therefore feel ourselves bound, though reluctantly, to say that the stamps in this case were not sufficient; and if not, it follows as a consequence upon the third point, that the note could not be received as evidence of an account stated. The statute 31 G. 3. provides explicitly, that no note shall be given in evidence or available in law or equity unless the paper on which it is written is duly stamped; and to allow it as proof of an account stated would be to admit it in evidence, and make it available upon the last question. It was conceded by Mr. *Taunton*, and is indisputable, that what the defendant said as to interest was an acknowledgment that there was some debt in existence, but what was the nature of that debt, whether it was due to the plaintiff in her character of executrix of *Boag* or in her own right, and whether it was one for which as-

(a) *Peake*, 173.

sumpsit would lie, are questions upon which we are left entirely in the dark; and under those circumstances we do not see how we can say that the plaintiff is entitled to a verdict even for nominal damages. We feel ourselves therefore compelled to say that the rule for a non-suit must be made absolute.

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GREEN
against
DAVIES.

Rule absolute.

DENN, on the Demise of MANIFOLD, against
DIAMOND.

EJECTMENT for premises in the county of *Chester*.

At the trial before *Warren C. J.* of *Chester*, at the last Summer assizes for that county, it appeared that the lessor of the plaintiff claimed under one *W. Barnes*, whose title depended upon a conveyance from his father *T. Barnes*. That deed recited that "*T. Barnes* being seized of the premises in fee was minded, and had resolved to give and assure the same to *W. Barnes*, as well in consideration of the natural love and affection which he entertained for *W. Barnes*, as also in consideration of the provision which *W. Barnes* had that day made (by his bond or obligation in writing) of 1500*l.* in augmentation of the portions or fortunes of his eight sisters;" and then proceeded to convey the premises to *W. B.* in fee. This deed had not any ad valorem stamp, whereupon it was objected, for the defendant, that it could not be received in evidence, and that the plaintiff must be nonsuited. The learned Judge overruled the objection,

Where a father, seized in fee of an estate, conveyed it to his son by a deed, which recited that he (the father) was minded, and had resolved to give and assure it to his son, as well in consideration of natural love and affection, as also in consideration of the provision which the son had that day made (by his bond) of 1500*l.* in augmentation of the portions or fortunes of his sisters: Held, that this was not a sale to the son within the meaning of the 48 G. 3. c. 149. schedule tit.

Conveyance, and that the conveyance was not subject to the ad valorem stamp duty.

1825. and the plaintiff obtained a verdict, the defendant having leave to move to enter a nonsuit. A rule nisi for that purpose was obtained in *Michaelmas* term, and now

—
 DENN dem.
 against
 DIAMOND.

D. F. Jones shewed cause. This question turns upon the construction of the 48 G.3. c. 149. In the sched. pt. 1. an ad valorem duty is required to be paid for the conveyance *upon the sale* of any lands; but in the present case there was no sale of the lands within the meaning of that statute. It was nothing more than a mode of dividing the father's property amongst his children. That the duty does not attach unless there is a sale of the lands properly so called, is plain from this that no ad valorem duty is payable upon the exchange of lands, although one party may give a sum of money in addition to his lands. But supposing this to be otherwise, still all the duty required by law has actually been paid. The only proof of pecuniary consideration was the recital of the bond. If the bond was a valid security it had an ad valorem stamp, if it had not such a stamp it was invalid, and then there was no pecuniary consideration for the conveyance.

Temple and *Parke* contra. The statute requires that the stamp should be upon the principal instrument whereby the lands are granted, and therefore the stamp on the bond would not suffice, even if it were of the same value as that imposed on the conveyance. But it is not of the same value, the duty on a bond for 1500*l.* being 4*l.*, and on a conveyance where the purchase-money is 1500*l.* the ad valorem duty is 10*l.* It must be admitted that the duty is only required where there is a sale of the lands. But this was a grant partly for
 natural

natural love and affection, and partly for a money consideration. It is not necessary in order to constitute a sale that the money should be paid to the grantor; it is sufficient if it be paid by the grantee. [*Holroyd J.* The gift of an estate by a father to all his children would clearly be voluntary; then suppose it be given to a son upon trust to divide it amongst all his father's children, or upon trust to pay an annual sum out of it, still that would be a voluntary grant of the estate, subject to a rent-charge. How then can the case be altered by the payment of a gross sum instead of an annuity?] A person may certainly grant his estate without coming within the statute, but where he converts the realty into money he is within it. If the estate had been conveyed, subject to a charge of 1500*l.*, then the estate only would have been liable; but here the person of the grantee was rendered liable by the giving of a bond. This falls within the provision in the 48 G. 3. c. 148. sched. pt. 1., title Conveyance, "that where any lands or other property shall be sold and conveyed subject to any mortgage, bond, or other debt, or to any gross or entire sum of money to be afterwards paid by the purchaser, such debt or sum of money shall be deemed part of the consideration in respect whereof the said ad valorem duty is to be paid."

BAYLEY J. It is a well settled rule of law, that every charge upon the subject must be imposed by clear and unambiguous language. Here the duty is imposed upon the *sale* of lands. Was the transaction in question a *sale* of lands within the meaning of the legislature? In common parlance, a seller disposes of his lands at an adequate price, which the purchaser pays. It appears to me that the present transaction was nothing more

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than a family arrangement, and it does not necessarily follow from any thing that appears in the case, that there was any essential connection between the giving of the bond and the conveyance of the estate. The deed does not import that the conveyance was made in consideration of money that the son would pay as part of the transaction; nor is it mentioned in the deed that the son had bargained to give the bond as a consideration. But I rely principally upon this, that the transaction is not to be considered as a *sale*. I cannot agree to the position, that wherever money is paid there is a sale. A father may give his estate to be divided amongst his children, leaving the mode of division to be arranged by them. Suppose a father were to give an estate to his son, stipulating at the same time that he should provide for his sisters, and the son were to agree to give them, and actually gave them, 10,000*l.*, surely that would not make it a *sale* of the estate by the father to the son. For these reasons, I think that the ad valorem stamp duty imposed on the *sale* of lands was not necessary in this case, and, consequently, that the deed having been properly received in evidence, this rule must be discharged.

HOLROYD J. Upon the true construction of this and all similar statutes, I am of opinion that the transaction in question was not a sale of lands within the meaning of the legislature. A sale imports a *quid pro quo*, in some way or other enuring to the benefit of the party selling. Here no benefit accrued to the father, it was altogether a gift to the son for the benefit of himself and the other members of his family. The father had no compensation, so considered in point of law. It is admitted that no duty would attach if the whole estate were

were divided amongst the different members of the family; if, then, any one receives money in lieu of his share of the estate, can that make it a sale within the meaning of the statute? It is true, that the son paying money for the estate may, in some sort, be considered a purchaser, but that does not make the father a seller; and to bring the case within the statute, I think there must be a *sale* as to both. I agree, therefore, that this rule must be discharged.

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DENN dem.
against
DIAMOND.

Rule discharged. (a)

(a) *Littledale J.* was absent.

BROMAGE and Another *against* PROSSER.

THIS was an action for words spoken of the plaintiffs in their trade and business as bankers at *Monmouth*.

The declaration stated that the plaintiffs carried on the trade and business of bankers in partnership at *Monmouth* and *Brecon*, and had always conducted themselves

In an action for words spoken of the plaintiffs in their trade as bankers, it was proved that *A. B.* met the defendant and said, "I hear

that you say that the plaintiffs' bank at *M.* has stopped. Is it true?" Defendant answered, "Yes, it is. I was told so. It was so reported at *C.*, and nobody would take their bills, and I came to town in consequence of it myself." It was proved that *C. D.* told the defendant that there was a run upon the plaintiffs' bank at *M.* Upon this evidence, the learned Judge, after observing that the defendant did not appear to have been actuated by any ill will against the plaintiffs, directed the jury to find their verdict for the defendant if they thought the words were not maliciously spoken: Held, upon motion for a new trial, that although malice was the gist of the action for slander, there were two sorts of malice, malice in fact and malice in law; the former denoting an act done from ill will towards an individual; the latter a wrongful act intentionally done, without just cause or excuse; and that in ordinary actions for slander, malice in law was to be inferred from the publishing the slanderous matter, the act itself being wrongful and intentional, and without any just cause or excuse; but in actions for slander, *prima facie* excusable on account of the cause of publishing the slanderous matter, malice in fact must be proved: Held, therefore, in this case, that the Judge ought first to have left it as a question for the jury, whether the defendant understood *A. B.* as asking for information, and whether he had uttered the words merely by way of honest advice to *A. B.* to regulate his conduct, and if they were of that opinion, then, secondly, whether in so doing he was guilty of any malice in fact.

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with credit and punctuality towards their creditors and customers; and until the speaking of the words, &c., had never been suspected of being guilty of any act of insolvency, or of having stopped or made default in payment of the monies due or owing from them in their said trade and business, but were in good credit and gaining great profits, yet defendant contriving, &c., spoke the following words: "The bank of *Bromage and Snead* (the plaintiffs) at *Monmouth* is stopped." The second count stated, that in a discourse which the defendant had with one *L. Watkins* in the presence and hearing of other subjects of the realm, of and concerning the plaintiffs in the way of their trade and business, and of and concerning the said bank of the plaintiffs at *Monmouth*, he, the defendant, further contriving and intending as aforesaid, in the presence and hearing of the said *L. Watkins* and the said last-mentioned subjects, and in answer to a certain question and observation put and made by the said *L. Watkins* to the defendant as to the said plaintiffs in their said trade and business, and as to the said defendant having said that the bank of the plaintiffs at *Monmouth* was stopped, falsely and maliciously spoke and published of and concerning the said plaintiffs, in the way of their aforesaid trade and business, and of and concerning the bank of the plaintiffs at *Monmouth* aforesaid, the words following: "Yes, it is. I was told so," thereby meaning that the plaintiffs had stopped and made default in the payment of the monies due and owing from them in their said trade and business of bankers at *Monmouth* aforesaid. The third count stated, that in answer to a question and observation put and made by *Watkins* to defendant as to the plaintiffs in their trade and business, and as to their bank at *Mon-*
mouth

mouth aforesaid being stopped, defendant spoke the words, "Yes, it is." Plea, not guilty. At the trial before *Park J.* at the Summer assizes for *Monmouth*, 1824, it appeared that *Watkins*, on the 13th of *January* 1824, met the defendant in *Brecon*, and addressing him, said, "I hear that you say the bank of *Bromage* and *Snead* at *Monmouth* has stopped. Is it true?" Defendant answered, "Yes, it is. I was told so. It was so reported at *Crickhowell*, and nobody would take their bills, and I came to town in consequence of it myself." *Watkins* then said, "You had better take care what you say; you first brought the news to town, and told *Mr. John Thomas* of it." Defendant repeated, "I was told so." It was proved on the part of the defendant that one *George Brown*, to whom the defendant had paid two one pound notes issued by the plaintiffs, told the defendant on the 12th of *January*, that there was a run upon the plaintiffs' bank, and that if there was any thing in it, he must take the notes back; and that he, *Brown*, afterwards returned the notes to the defendant on that ground; but he never told the defendant that the bank had stopped, or that nobody would take their bills. The learned Judge told the jury, that malice was the gist of the action; that it did not appear from the evidence that the defendant was actuated by any ill will against the plaintiffs; and that if the words were not spoken maliciously, the defendant was not answerable; that they ought therefore to find their verdict for the defendant if they thought that the words were not spoken maliciously, otherwise for the plaintiffs. The jury found a verdict for the defendant. A rule nisi for a new trial was obtained in last *Michaelmas* term by *Campbell*, on the ground that the learned Judge had improperly left to the jury

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jury the question of malice, for it was to be inferred in this case from the act of the defendant, inasmuch as the occasion did not justify the speaking of the words.

W. E. Taunton and *Maule* shewed cause. The question of malice was properly left to the jury. In *Heuer v. Dawson* (a), which was an action for saying of the plaintiff, a tradesman, "He cannot stand it long, he will be a bankrupt soon," it was proved by a witness that the words were not spoken maliciously, but by way of warning; and *Pratt* C. J. directed the jury, "that though the words were otherwise actionable, yet if they should be of opinion that the words were not spoken out of malice, but in the manner before mentioned, they ought to find the defendant not guilty," and they did so accordingly. So in *Rogers v. Clifton* (b), Lord *Alvanley* says, "I think I should grievously have invaded the province of a jury if I had not left it to them to say whether, considering all the circumstances of the case, the conduct of the defendant was not malicious." [*Bayley* J. Under certain circumstances, words which would otherwise be actionable, are prima facie excusable by the occasion; those, however, are excepted cases.] All those cases come within this rule that the circumstances negative malice. The occasion may alter the burthen of proof, but still the malice is a question for the jury. If malice is to be presumed, the presumption is to go to the jury as proof, therefore, quacunqve via, the question must be decided by them. It cannot be disputed that the evidence given by the defendant tended to negative malice. But even if that were doubtful, the

(a) *Bull. N. P.* 8.(b) 3 *B. & P.* 592.

plaintiffs

plaintiffs would not be entitled to a new trial. Upon the first count it is clear that the verdict was properly found for the defendant, for there was no evidence to support it; the words there set out amount to a positive statement by the defendant that "the bank of *Bramage and Smead at Monmouth* had stopped;" the evidence was that, in answer to questions whether defendant had said so, and whether it was true, the defendant said it was, and that he was told so, and that it was so reported at *Crick-hornell*. Now these words do not amount to a charge that the bank had stopped; there is a material variance between the allegation and the proof. The second count is quite new in form; and it alleges that, in answer to a question put by *Watkins* to defendant as to the plaintiffs in their trade and business, and as to the defendant having said that the bank of the plaintiffs at *Monmouth* had stopped, the defendant spoke of and concerning the plaintiffs in the way of their trade and business, and of and concerning the bank of the plaintiffs at *Monmouth*, the words, "Yes, it is; I was told so." It is not averred that the answer had reference to the assertion that the bank had stopped. If a verdict had been found for the plaintiffs on that count, no judgment could have been given. The third count is equally objectionable. It is quite ambiguous whether the defendant meant to say that he had used certain words or that those words were true. The record is therefore defective, *Garford v. Clark* (a), and on that ground the Court will not grant a new trial.

Campbell and *G. B. Cross* contra. The words spoken by the defendant were in themselves clearly actionable,

(a) *Cro. Eliz.* 857.

and

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and the plaintiff is entitled to a new trial, unless it is to be decided that in all cases of slander, without reference to the occasion or circumstances of uttering it, malice is a question for the jury. It has hitherto been understood that when slanderous words are spoken, without any privilege for the communication, the law infers malice from the probable result, viz. the injury to the defendant. The cases cited on the other side were instances of privileged communications, and totally different from the present. Suppose this defendant to have said that the plaintiff stole a horse, it would be no answer to say that he had heard so, and believed it to be true; no question of malice could, under such circumstances, be left to the jury. A plea stating such facts would be clearly insufficient; the evidence must be likewise insufficient when given under the general issue. Now, in this respect, there is no difference between words imputing felony and insolvency. Even if the words had been spoken to the defendant under circumstances which justified them, yet a faithful repetition of them would not be justified unless the author were named, *Davis v. Lewis*.^(a) Here there was not a faithful repetition of what the defendant heard; he was told there was a run upon the bank, and he reported that it had stopped. Then, as to the sufficiency of the evidence, there certainly was evidence to support the first count. [*Little-dale J.* In an action for words you cannot out of a question and answer make an affirmative proposition. You must state the question and answer.] Still the evidence may be taken as an admission by the defendant that he said so and so on a former day; and evi-

(a) 7 T. R. 17.

dence of an admission of having spoken certain words is sufficient to support a declaration charging those words. To the second and third counts no objection was made at the trial, and the words were proved as laid. [Bayley J. Does the question, "Is it true?" mean, "Is it true that you said so and so?" or, "Is it true that the bank has stopped?"] That being equivocal, was a question for the jury. If the defendant by answering, "Yea, it is," meant that he had used the words, the second count was proved; if he meant that the bank had stopped, the third count was proved; and, in either case, the plaintiff was entitled to a verdict.

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Cur. adv. vult.

BAYLEY J. now delivered the judgment of the Court. This was an action for slander. The plaintiffs were bankers at *Monmouth*, and the charge was, that in answer to a question from one *Lewis Watkins*, whether he, the defendant, had said that the plaintiff's bank had stopped, the defendant's answer was, "it was true, he had been told so." The evidence was, that *Watkins* met defendant and said, "I hear that you say the bank of *Bromage* and *Snead*, at *Monmouth*, has stopped. Is it true?" Defendant said, "Yes it is; I was told so." He added, "it was so reported at *Crickhowell*, and nobody would take their bills, and that he had come to town in consequence of it himself." *Watkins* said, "You had better take care what you say; you first brought the news to town, and told Mr. *John Thomas* of it." Defendant repeated, "I was told so." Defendant had been told at *Crickhowell*, there was a run upon plaintiffs' bank, but not that it had stopped, or that nobody would take their bills, and what he said went greatly beyond
 what

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against
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what he had heard. The learned Judge considered the words as proved, and he does not appear to have treated it as a case of privileged communication; but as the defendant did not appear to be actuated by any ill will against the plaintiffs, he told the jury that if they thought the words were not spoken *maliciously*, though they might unfortunately have produced injury to the plaintiffs, the defendant ought to have their verdict; but if they thought them spoken *maliciously*, they should find for the plaintiff: and the jury having found for the defendant, the question upon a motion for a new trial was upon the propriety of this direction. If in an ordinary case of slander, (not a case of privileged communication), want of malice is a question of fact for the consideration of a jury, the direction was right; but if in such a case the law *implies* such malice as is necessary to maintain the action, it is the duty of the Judge to withdraw the question of malice from the consideration of the jury: and it appears to us that the direction in this case was wrong. That *malice*, in some sense, is the gist of the action, and that therefore the *manner and occasion of speaking the words* is admissible in evidence to shew they were not spoken *with malice*, is said to have been agreed (either by all the Judges, or at least by the four who thought the truth might be given in evidence on the general issue), in *Smith v. Richardson* (a); and it is laid down 1 *Com. Dig.* action upon the case for defamation G 5. that the declaration must shew a *malicious intent* in the defendant, and there are some other very useful elementary books in which it is said that malice is the gist of the action, but in what

(a) *Willer*, 24.

sense the word *malice* or *malicious intent* are here to be understood, whether in the *popular* sense, or in the sense the *law* puts upon those expressions, none of these authorities state. Malice in common acceptation means ill will against a person, but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it *of malice*, because I do it *intentionally* and without just cause or excuse. If I maim cattle, without knowing whose they are, if I poison a fishery, without knowing the owner, I do it *of malice*, because it is a wrongful act, and done intentionally. If I am arraigned of felony, and wilfully stand mute, I am said to do it *of malice*, because it is intentional and without just cause or excuse. (a) And if I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury, whether I meant to produce an injury or not, and if I had no legal excuse for the slander, why is he not to have a remedy against me for the injury it produces? And I apprehend the law recognizes the distinction between these two descriptions of malice, malice in fact and malice in law, in actions of slander. In an ordinary action for words, it is sufficient to charge that the defendant spoke them *falsely*, it is not necessary to state that they were spoken *maliciously*. This is so laid down in *Styles* 392., and was adjudged upon error in *Metcuer v. Sparks*. (b) The objection there was, that the words were not charged to have been spoken maliciously, but the Court an-

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against
Froese.

(a) *Russell on Crimes*, 614. N. 1.(b) *Owen*, 51. *Noy*, 35.

swered,

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swered, that the words were themselves malicious and slanderous, and, therefore, the judgment was affirmed. But in actions for such slander as is *prima facie* excusable on account of the cause of speaking or writing it, as in the case of servant's characters, confidential advice, or communications to persons who ask it, or have a right to expect it, malice in fact must be proved by the plaintiff, and in *Edmonson v. Stevenson* (a), Lord Mansfield takes the distinction between these and ordinary actions of slander. In *Weatherstone v. Hawkins* (b), where a master who had given a servant a character, which prevented his being hired, gave his brother-in-law, who applied to him upon the subject, a detail by letter of certain instances in which the servant had defrauded him; Wood, who argued for the plaintiff, insisted that this case did not differ from the case of common libels, that it had the two essential ingredients, slander and falsehood; that it was not necessary to prove express malice; if the matter is slanderous, malice is implied, it is sufficient to prove publication; the motives of the party publishing are never gone into, and that the same doctrine held in actions for words, no express malice need be proved. Lord Mansfield said the general rules are laid down as Mr. Wood has stated, but to every libel there may be an implied justification from the occasion. So as to the words, instead of the plaintiff's shewing it to be false and malicious, it appears to be incidental to the application by the intended master for the character; and Buller J. said, this is an exception to the general rule, on account of the occasion of writing. In actions of this kind, the plaintiff must prove the words "malicious" as well as

(a) Bull. N. P. 8.

(b) 1 Term Rep. 110.

false.

false. Buller J. repeats in *Pasley v. Freeman* (a), that for words spoken confidentially upon advice asked, no action lies, unless express malice can be proved. So in *Hargrave v. Le Breton* (b), Lord Mansfield states that no action can be maintained against a master for the character he gives a servant, unless there are extraordinary circumstances of express malice. But in an ordinary action for a libel or for words, though evidence of malice may be given to increase the damages, it never is considered as essential, nor is there any instance of a verdict for a defendant on the ground of want of malice. Numberless occasions must have occurred (particularly in cases where a defendant only repeated what he had heard before, but without naming the author), upon which, if that were a tenable ground, verdicts would have been sought for and obtained, and the absence of any such instance is a proof of what has been the general and universal opinion upon the point. Had it been noticed to the jury how the defendant came to speak the words, and had it been left to them as a previous question, whether the defendant understood *Watkins* as asking for information for his own guidance, and that the defendant spoke what he did to *Watkins*, merely by way of honest advice to regulate his conduct, the question of malice in fact would have been proper as a second question to the jury, if their minds were in favour of the defendant upon the first; but as the previous question I have mentioned was never put to the jury, but this was treated as an ordinary case of slander, we are of opinion that the question of malice ought not to have been left to the jury. It was, however, pressed

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(a) 5 T. R. 61.

(b) 3 Burr. 2425.

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upon us with considerable force, that we ought not to grant a new trial, on the ground that the evidence did not support any of the counts in the declaration, but upon carefully attending to the declaration and the evidence, we think we are not warranted in saying that there was no evidence to go to the jury to support the declaration; and had the learned Judge intimated an opinion that there was no such evidence, the plaintiff might have attempted to supply the defect. We, therefore, think that we cannot properly refuse a new trial, upon the ground that the result upon the trial might have been doubtful. In granting a new trial, however, the Court does not mean to say that it may not be proper to put the question of malice as a question of fact for the consideration of the jury; for if the jury should think that when *Watkins* asked his question the defendant understood it as asked in order to obtain information to regulate his own conduct, it will range under the cases of privileged communication, and the question of malice, in fact, will then be a necessary part of the jury's inquiry; but it does not appear that it was left to the jury in this case, to consider whether this was understood by the defendant as an application to him for advice, and if not, the question of malice was improperly left to their consideration. We are, therefore, of opinion, that the rule for a new trial must be absolute.

Rule absolute.

1825.

DOE on the Demise of Lord DARLINGTON
against Cock and Others. (a)

EDWARD LAWES moved for judgment against the casual ejector; the service being without objection as to all the tenants except one *John Denham*, with respect to whom it was stated, that a copy of the declaration and notice was affixed to the door of the dwelling-house of *J. D.* (then tenant in possession of the residue of the premises), which was locked up, no person being resident therein, and the tenant not having lived there nor in the neighbourhood for three months, and having no other residence in the county. The affidavit further stated, that all the premises sought to be recovered by the ejectment had been let to one *J. Cock*, who had underlet different parts of them to *John Denham* and the other tenants. On this affidavit, it was submitted by *Lawes*, that either the service on *Denham* might be considered sufficient; or that the service on *Cock* would entitle the lessor of the plaintiff to judgment as to the whole premises, for as they had been originally let to him, the possession of the under-tenants was his possession. He quoted *Roe v. Wiggs*, 2 N. R. 330. But

In ejectment for premises which had been demised on lease to one person who had underlet to others, it was held to be necessary to serve all the under-tenants with a copy of the declaration.

Where the tenant of a house locked it up and quitted it, and the landlord three months afterwards fixed a copy of a declaration in ejectment to the door: Held, that the service was not sufficient, but that the landlord should have treated it as a vacant possession.

LITTLEDALE J. held the affidavit defective as to the premises in *Denham's* occupation, as to them he considered the case to be one of a vacant possession. He also held, that notwithstanding *Cock* was lessee of the whole premises, the several tenants in actual possession must be separately served.

Rule refused.

(a) This and the following case were decided in the term, but were accidentally omitted in their proper place.

1825.

THOMAS *against* WILLIAMS.

A rule for costs for not proceeding to trial may be obtained after a rule for judgment, as in case of a nonsuit, has been discharged.

ROGERS having obtained a rule nisi for judgment as in case of nonsuit, upon reading an affidavit filed on the part of the plaintiff, consented to take a peremptory undertaking, but he prayed that the rule might not be discharged, but be enlarged until the next term, to enable him, consistently with the practice of the Court, to move for a rule for costs for not proceeding to trial, inasmuch as it was laid down in 2 *Tidd's Practice*, 819. eighth edition, that a defendant cannot move for judgment as in case of a nonsuit, and costs for not proceeding to trial at the same time, *nor after moving for the former is he allowed to apply for the latter*, and the same rule is laid down in *Hullock on Costs*, 804. and in *Archbold's Practice*.

BAYLEY J. however was of opinion that, notwithstanding what appeared in the books of practice, a rule for costs might be obtained after the rule for judgment in case of a nonsuit was discharged.

Rule discharged.

END OF EASTER TERM.

C A S E S

ARGUED AND DETERMINED

1825.

IN THE

Court of KING's BENCH,

IN

Trinity Term,

In the Sixth Year of the Reign of GEORGE IV.

JOHN EVANS *against* GWYNNE GILL VAUGHAN, *Friday.*
Heir of GWYNNE VAUGHAN, deceased. *June 3d.*

DECLARATION on a lease, bearing date the 24th of April 1786, whereby *G. Vaughan*, deceased, demised to *W. Evans* the premises therein described; habendum to him *W. Evans*, and his heirs, for the natural lives of him *W. Evans*, since deceased, *John A. being seised in fee of an estate, by lease and release executed upon his marriage, settled the same upon himself for life, remainder to his first and other sons in tail, with a power to the tenant for life to grant leases for years, determinable on three lives. A. afterwards granted a lease of part of the estate in question for the lives of three persons therein named, and the life of the survivor; and there was a covenant that the lessee should quietly hold and enjoy the premises for and during the said term, without interruption of the lessor, his heirs or assigns, or any other person claiming any estate, right, or interest by, from, or under him or any of his ancestors. The lease being for three lives absolutely, was not conformable to the power, and became void on the death of A., and his eldest son brought an ejectment and evicted the lessee, two of the cestuy que vies being then living: Held, that the eldest son was a person claiming under the lessor within the meaning of the covenant for quiet enjoyment. Held, secondly, that by the words, during the said term in that covenant, the parties intended a term to continue so long as any of the cestuy que vies survived, and not a term to continue only for the life of the grantor.*

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Evans, the plaintiff, and *T. Evans*, sons of the said *W. Evans*, and during the life and lives of the survivor, at the rent therein mentioed. Covenant by the lessor for himself, his heirs and assigns, that the lessee and his heirs should quietly and peaceably hold, occupy, possess, and enjoy the premises *for and during the said term*, without the let, suit, trouble, hindrance, molestation, disturbance, or interruption of the said *G. Vaughan*, his heirs or assigns, or any other person claiming or to claim any estate, right, or interest in or to the same premises, &c. or any part thereof, by, from, or under him or any of his ancestors. Breach, that since the death of the lessee, whose heir the plaintiff was, the plaintiff had not been permitted peaceably and quietly to enjoy the premises *for and during the said term*, without the let, suit, trouble, hindrance, molestation, disturbance, or interruption of the said *G. Vaughan*, his heirs, or assigns, or any other person or persons claiming or to claim any estate, right, or interest in the same premises, or any part thereof, but on the contrary thereof, that the defendant lawfully claiming an estate, right, title, and interest in and to the said demised premises, by virtue of a certain title thereto to him theretofore made and derived, by, from, and under the said *G. Vaughan*, after the making of the said indenture, and after the respective deaths of the said *G. Vaughan* and *W. Evans*, and before the *expiration of the said term*, to wit, on the 1st of *January* 1816, at, &c., by virtue of the said estate, right, and interest entered into and upon the said demised premises, with the appurtenances in and upon the said possession of the plaintiff, and evicted the plaintiff from the same; and the plaintiff so evicted, &c. Plea, 1st. Non est factum.

2dly. That defendant did not claim any estate, right, title, or interest in and to the said demised premises, by virtue of any title to him theretofore made and derived by, from, and under the said *G. Vaughan*. Issue thereon. 3dly. That defendant did not enter into and upon the said demised premises, before the expiration of the said term, upon which also issue was joined. At the trial before *Abbott C. J.*, at the *Middlesex* sittings after last term, the following appeared to be the facts of the case. By lease and release of the 28th and 29th October 1774, *G. Vaughan* being seised in fee simple of the demised premises (amongst others) upon his marriage, settled his estates, comprising the premises in question, upon himself for life, remainder to his first and other sons in tail; and the deeds contained the following leasing power, "that it shall be lawful for the person (being in possession of all or any part of the premises hereinbefore mentioned, by virtue of any of the limitations,) by any deed indented to make any lease or leases of the said premises, for any term or number of years not exceeding twenty-one years from the making thereof, or for any term or number of years determinable upon one, two, or three life or lives in possession, or by way of future interest, so as the estate in possession and future interest be determinable upon the deaths of one, two, or three person or persons, and be not to continue any longer than for the lives of three persons at the most, &c." *Gwynne Vaughan*, the testator and tenant for life under the marriage settlement, on the 24th of April 1786, granted the lease mentioned in the declaration to *W. Evans* and his heirs, habendum to him and his heirs from the 29th of September then last for the lives of the three persons mentioned in the declar-

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ation, and the life of the survivor; and the lease contained the covenants for quiet enjoyment there set out. The plaintiff was the eldest son and heir at law of the lessee, who died intestate on the 4th of *August* 1796. The plaintiff entered into possession of the demised premises, and continued in possession until the 9th of *November* 1816, when the defendant recovered possession in an action of ejectment, on the ground that the lease was void, not being conformable to the power, the lessor only having power to make leases for twenty-one years absolutely, or for years determinable on three lives, and the lease in question being a freehold lease for three lives. Two of the cestuy que vies were then living. Upon this evidence it was contended by the defendant's counsel, that there was no breach of the covenant; first, because the defendant could not be said to have claimed under his father, but in his own right as tenant in tail under the marriage settlement; and, secondly, that there was no eviction *during the term*, because the term granted by the lease expired upon the death of the first tenant for life. The Lord C. J. was of opinion, that the defendant must be considered to have claimed under his father, within the meaning of the covenant; and, secondly, that the words "the said term" in the lease meant the term which the lessor purported to grant, viz. a term continuing for three lives, and, therefore, there was a breach of covenant by the defendant's eviction of the plaintiff during that term. The jury having found a verdict for the plaintiff, damages 1500*l.*,

W. E. Taunton now moved for a new trial upon both grounds. He admitted, however, as to the first point, that the view taken of the subject by the Lord Chief

Justice was supported by the decision in *Hurd v. Fletcher*. (a) As to the other point, there was no breach of the covenant by the defendant, because he did not evict the lessee *during* the term, but *after* it had determined. The lease not being conformable to the power, was valid only during the life of the grantor. Upon his death it became absolutely void, *Ludford v. Barber* (b). *Doe d. Martin v. Watts*. (c) The term granted by the lease was therefore determined on the death of the tenant for life. The word *term* signifies the estate and interest passed by the lease. It is true that Lord Coke, 1 *Inst.* 45 (b.) says, that the word *terminus* signifies not only the limit and limitation of time, but also the estate and interest that passes for that time; but in the passage which immediately follows, it is clearly used as signifying the estate and interest that passed. He goes on, "as if a man make a lease for 21 years, and after make a lease to begin *a fine et expiratione prædicti termini 21 annorum dimiss*: and after the first lease is surrendered, yet the second lease shall begin presently; but if it had been to begin *post finem et expirationem prædicti 21 annorum*, in that case, although the first term had been surrendered, yet the second lease should not begin till after the 21 years be ended by effluxion of time." Here Lord Coke points out the distinction between the words *time* and *term*. The words *during the said term* are therefore synonymous with the words during the continuance of the estate. Then the estate granted by the lease being at an end, and the lease itself being void on the death of the tenant for life, all the covenants which related to

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(a) *Doug.* 43.(b) 1 *T. R.* 86.(c) 7 *T. R.* 83.

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and were dependant on the estate granted are void also, *Northcote v. Underhill* (a), *Caponhurst v. Caponhurst* (b), *Soprani v. Skurro* (c), *Knipe v. Palmer*. (d) Here the covenant for quiet enjoyment is a covenant running with the land, relating to and dependent on the estate granted by the lease; it became void therefore on the cesser of the estate to which it related, and, consequently, there was not any breach of covenant by the defendant during the term.

ABBOTT C. J. It is a good rule of construction that deeds should be construed so as to give effect to the intention of the parties. This case arises on a deed whereby the lessor for himself, his heirs, and assigns, covenants that the lessee and his heirs paying the rents and duties, and performing the covenants and agreements in the indenture contained, should and might peaceably and quietly have, hold, occupy, possess, and enjoy all and singular the demised premises for and during the said term, without the let, suit, trouble, hindrance, molestation, disturbance, or interruption of the lessor, his heirs or assigns, or any other person or persons claiming, or to claim any estate, right, or interest in or to the same premises, or any part thereof, by, from, or under him or any of his ancestors," and the question is, what the parties to this deed intended by the words "*during the said term.*" It seems to me that they must have understood that term which the lessor purported to grant by the deed, viz. a term to continue for the three lives therein mentioned. It is contended, that as the lessor had not the power to grant a lease for three lives,

(a) *Salk.* 199.(b) *Lev.* 45.(c) *Yelv.* 18.(d) 2 *Wils.* 130.

the

the term actually granted was a term to continue only for his life, and that therefore the parties to the lease must have intended by the words *during the said term*, a term continuing only for the life of the lessor. Unless, however, we suppose that the lessor knew that he had no power to grant the lease for three lives absolutely, and that when he assumed so to do he was actually committing a fraud, we must understand that he intended to grant a lease to continue for three lives, and that when he covenanted that the lessee should quietly enjoy during the said term, he intended that that covenant should be binding on him and his heirs during the continuance of the three lives. I think if we were to hold that he thereby intended a term for the life of the lessor, and not for the lives of the cestuy que vies, we should be giving a construction quite contrary to the intention of the parties. The lessor says, by his deed that the lessee shall have the estate for that period for which he purports to grant it, and it is not open to him, or any person claiming under him, to say that he meant by the words "*during the said term*," any other term than that which he purported to pass by his deed. I think, therefore, that the term contemplated by the parties to the deed, and mentioned in the covenant for quiet enjoyment, was a term to continue for the three lives mentioned in the lease, and that the representative of the lessor having evicted the lessee while two of the cestuy que vies were living, was guilty of a breach of the covenant for quiet enjoyment. As to the other point, this case must be governed by that of *Hurd v. Fletcher*. There a fine being levied of a feme covert's estate with a joint power to the husband and wife to declare the uses of the fine and the uses having been declared in remainder to A, the husband made a lease and

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covenanted for quiet possession against any persons claiming under him. *A.* evicted the tenant, and it was held that an action would lie against the husband's executors upon the covenant for quiet enjoyment. Upon the authority of that case, I am of opinion that the defendant was a person claiming under the lessor, within the meaning of the covenant for quiet enjoyment.

HOLROYD J. (*a*) I think, upon the authority of the case of *Hurd v. Fletcher*, that the defendant must be taken to have claimed under the lessor within the meaning of the covenant. I am also of opinion that he was guilty of a breach of the covenant during the term, by evicting the heir of the lessee during the lifetime of two of the cestuy que vies. By the lease, the lessor assumes to convey an interest in the premises demised during the lives of the three persons therein mentioned, and he covenants that the lessee shall quietly enjoy during the said term. I think that those words must be construed with reference to that term which he assumed to grant, and being so construed, it is quite clear that that was a term or interest to continue so long as any of the three lives were in being.

LITLEDALE J. I have no doubt that the intention of the parties was, that the lessee should enjoy the demised premises during the whole of the three lives, and that we ought to construe this deed according to the intention. The case of *Wright v. Cartwright* (*b*) is an authority to shew that the word *term* may either signify the time or the estate granted. In this case, I am satisfied that it is to be taken as denoting the time during

(*a*) *Bayley J.* was absent.

(*b*) 1 Burr. 282.

which

which the lives of the three persons would endure, and that being so, I think there was a breach of the covenant for quiet enjoyment during the term mentioned in the lease. As to the other point, I entirely agree with the rest of the Court.

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against
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Rule refused.

PRATT against HILLMAN and Two Others.

Friday,
June 3d.

TRESPASS for building a wall on the roof of the plaintiff's house, whereby it was injured. Plea, not guilty. At the trial before *Abbott C. J.* at the *Westminster* sittings after *Hilary* term 1824, a verdict was taken for the plaintiff, subject to the award of a barrister. The arbitrator awarded that a verdict should be entered for the defendants, and annexed to his award the following certificate: "It appeared in evidence before me, first, that the house of the defendant *Hillman*, was of the first class, and that the house of the plaintiff, *Pratt*, was of the third class of buildings mentioned in the 14 G. 3. c. 78. s. 1. (the building act), and that the two houses adjoin to each other, being separated by a party wall. That both houses were built before the building act was passed, and are within the district over which the provisions of that act extend. That the defendant *Hillman*, intended to make certain alterations in his house, and on that occasion it became necessary, in order to carry the alterations of his house into effect, that the defendant *Hillman*, should raise the whole party-wall between his house and that of the plaintiff, and that in pursuance of such intention, the several defendants, in *March* 1822, built the wall in question upon the

Where a party raising a party-wall, bona fide intended to comply with the directions of the building act 14 G. 3. c. 78., but did not in fact do so, and injured the adjoining house, the owner of which brought trespass: Held, that the raising of the wall was to be considered as done in pursuance of the statute, and that the defendant was entitled to the protection given by the 100th section.

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the old party-wall. That the defendant *Hillman*, and the other defendants, in doing what they did, bonâ fide intended to comply with the provisions of the building act; That the wall in question was examined whilst it was building, and directions as to the mode of building it given by the regular district surveyor. That the wall, as it was in fact built, was not at all conformable to the provisions of the building act. That in consequence of the old party-wall being so raised, the weight of the added part pressing on the part below, has produced considerable damage to the plaintiff's house. That before the action was brought, the plaintiff did not, in compliance with the 100th section of the building act, give the notice there required, and that he commenced his action in July 1823, being after more than three calendar months had expired from the building of the wall by the defendants. I thought that this omission on the part of the plaintiff was fatal to his recovery in the action, and that the action was brought at too late a period, and awarded a verdict for the defendants on this ground." In *Hilary* term 1825 a rule nisi for setting aside the award was obtained, against which

Park now shewed cause. It is certified by the arbitrator that the defendants in doing what they did, bonâ fide intended to comply with the provisions of the building act; they must therefore be considered as having done the thing "in pursuance of the act," *Weller v. Toke* (a), *Gaby v. The Wilts and Berks Canal Company* (b). Now the 100th section of the 14 G. 3. c. 78. enacts, "That no action or suit shall be commenced against any person or persons for any thing done in

(a) 9 East, 564.

(b) 3 M. & S. 580.

pursuance

pursuance of that act until twenty-one days after notice in writing of an intention to bring such action has been given to the person or persons against whom such action or suit shall be brought; nor after the expiration of three calendar months next after the fact committed." The plaintiff had not complied with either of the requisites of that section, the arbitrator was therefore right in ordering the verdict to be entered for the defendants.

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F. Pollock contra. The injury sustained by the plaintiff's house was in consequence of defendant *Hillman* having raised the party-wall between that house and his own. Now the 42d section of the building act provides, "that no party-wall shall be raised unless the same can be done with safety to such wall, and the several buildings adjoining thereto." That imposes upon the party raising the wall the duty of first ascertaining that it can be done with safety. It does not appear that any such previous enquiry was made in the present case, and the arbitrator has found that the wall as it was built was not at all conformable to the provisions of the building act. Under such circumstances, it cannot be said that the wall was raised in pursuance of the act, and consequently the defendants are not in a situation to claim the protection of the 100th section.

ABBOTT C. J. I consider the 42d section of the 14 G. 3. c. 78. as having given an authority to raise party-walls. But that authority must be exercised in a particular mode, and under certain circumstances. If it be so exercised the party is altogether justified. But if a party intending to act under the authority
 given,

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given, does not pursue the particular directions laid down, he is not altogether justified, but must answer for the damage occasioned by that which he has done. Still, however, he is entitled to the protection given by the 100th section; and as this plaintiff did not give the notice or commence his action within the period prescribed by that section, the arbitrator very properly ordered the verdict to be entered for the defendants. The rule for setting aside the award must therefore be discharged.

Rule discharged.(a)

(a) See *Waterhouse v. Keen*, ante, 205.

Saturday,
June 4th.

STEELE *against* MART.

A lease purported on the face of it to have been made on the 25th March 1783, habendum to the lessee from the 25th March now last past for thirty-five years. There was evidence to shew that the lease was not executed until after the 25th March 1783: Held, that it took effect from the time of delivery, and not from the day of the date, and consequently that the term commenced on the 25th March 1783, and not on the 25th of March preceding the date of the deed.

DEBT for use and occupation. Plea, nil debet. At the trial before *Abbott C. J.* at the *Middlesex* sittings after last *Michaelmas* term, the plaintiff proved a lease of the premises in question from *Elizabeth Lorymer Walker* to *Joseph Dale*, made on the 17th December 1787, to hold from the feast day of the birth of our Lord Christ then next ensuing, for the term of twenty-nine years and one quarter of a year, wanting three days, at the yearly rent of 124*l.*, payable quarterly. It was further proved that the plaintiff had married *Elizabeth Lorymer Walker*, and that she had since died, and that the defendant had been in possession of the demised premises from the 25th March 1817, until the

28th *March* 1818. The plaintiff also proved the original lease of the premises to *John Walker*, the father of *Elizabeth Longmer Walker*. That lease purported to have been made on the 25th *March* 1783, by *William Gooding* the elder, *William Gooding* the younger, *James Gooding*, and *Sampson Gooding*, to *John Walker*, of the parish of *St. Mary-le-Bone*, sadler, habendum to him from the feast day of the Annunciation of the Blessed Virgin *Mary then last past*, for thirty-five years; and it recited that in consideration of the rents and covenants therein contained on the lessee's part to be paid and performed, and of the surrendering and giving up to be cancelled certain indentures of lease made between the same parties, bearing date the 10th *April* 1776, whereby the messuage or tenement, with the appurtenances thereafter demised and leased to the said *John Walker*, were demised for a term of thirty-five years from *Lady-day* then last, they, the lessors, had demised the premises therein particularly described, which were stated then to be in the tenure of the said *J. Walker* or his under tenants, &c., habendum from the feast day of the Annunciation of the Blessed Virgin *Mary then last past*, for and during, and unto the full end and term of thirty-five years then next ensuing, and fully to be complete and ended, paying during the said term of thirty-five years, unto the said *W. Gooding* the elder, and his assigns, if he should so long live, the yearly rent of 60*l.* on the 24th *June*, 29th *September*, 25th *December*, and the 25th *March*, by even and equal portions; and if the said *W. Gooding* the elder, should happen to die before the expiration of that demise, then paying during the remainder of the term from his death, to the said *W. Gooding* the younger, *J. Gooding*, and *S. Good-*

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S. Gooding, their respective executors, &c., the yearly rent of 60*l.*, on the before last-mentioned days of payment, the first payment to be made on the first of the said feast days which should happen after the decease of *W. Gooding* the elder; yielding and paying also during the aforesaid term of thirty-five years, unto *W. G.* the younger, *J. G.*, and *S. G.*, their executors, &c., the further yearly rent of 15*l.*, at the before-mentioned days of payment, the first payment thereof to begin and be made upon the *24th day of June next ensuing the date thereof*. The lease contained the usual covenants for payment of rent, &c., and was attested in the usual manner; and near to the attestation there was the following memorandum signed by all the lessors: "We whose names are under mentioned do agree to the within writings that the said *John Walker* for the space of thirty-five years is to pay 60*l.* per year neat money; and to prevent any dispute which might arise, we have indorsed the same from *Lady-day* 1783." The lease was folded up in the usual manner, and there was the following indorsement on the back of it: "Dated the 10th of *May* 1783." Upon this evidence it was contended, on the part of the defendant, that as the first lease purported to be made on the 25th *March* 1783, to hold from the 25th *March* then last past, that it took effect from the 25th *March* 1782, and consequently that the term of thirty-five years expired on the 25th *March* 1817, and that the plaintiff therefore had no interest in the premises after that period. The Lord Chief Justice overruled the objection, and the plaintiff obtained a verdict for 250*l.*, with liberty to the defendant to move to enter a nonsuit. A rule nisi having been obtained on *Hilary* term last upon the objection taken at the trial,

Gurney

Gurney (and *Tindal* was with him) now shewed cause. Although the lease purports to bear date on the 25th of *March* 1783, yet the indorsement clearly shews that it was not executed until after that time. There could be no reason for making the term commence a year before the date of the lease; for the lessee was then in possession under a lease which had many years to run. Then by the indorsement, the lessors declare that the lease was not executed until after *March* 1783. There is every reason to suppose that the indorsement was written at the time when the lease was executed. The probability is, that when the parties met, the 25th of *March* 1783 had been inserted in the lease, and that to prevent disputes, the memorandum was then written, and if that be so, then it is evidence that it was not executed until after *March* 1783. He was then stopped by the Court.

Marryat and *Campbell* contra. The words of the habendum are clear. The lease is dated the 25th *March* 1783, and the tenant is to hold from the 25th *March* then last past; that must mean the 25th of *March* 1782, and it is not competent to a party to shew the time of the execution of a deed to be different from that which it is expressed to be on the face of it, and where there is nothing equivocal in the habendum, the other parts of the deed cannot be called in aid to explain it. Had there been any ambiguity in the habendum, the case would have been otherwise. The circumstance, therefore, of the 15*l.* rent being reserved so as to commence on the 24th of *June*, is immaterial. Then as to the effect of the memorandum, the words, "we have indorsed the same from the 25th *March* 1783," are very ambiguous. Besides, there is no evidence to shew when
this

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this memorandum was written, and if it was written after the execution of the lease, it cannot have the effect of enlarging or abridging the term granted by it. [*Abbott C. J.* Suppose it was proved beyond all possibility of doubt, that the lease was not executed until the 10th of *May* 1783, is it not quite clear that the term must in law be taken to have commenced on the 25th of *March* in that year?] [*Bayley J.* It is laid down in *Clayton's* case, that if there be a lease for a given time from *henceforth* dated one day and executed another, it shall run from the day of the execution.] There was no proof that the lease was executed after the 25th of *March* 1783.

ABBOTT C. J. I am of opinion that in point of law the term began to run from the *Lady-day* preceding the delivery of the deed, and not from the *Lady-day* preceding the day inserted in the deed as the date; and then the only question is, whether there was any satisfactory proof that the first lease was executed after *Lady-day* 1783. If there was, then, as the lease was to commence from *Lady-day* then last past, the term granted by it would commence at *Lady-day* 1783, and continue until the 25th of *March* 1818. I thought at the trial there was abundant evidence to shew that the lease was not executed until after the 25th of *March* 1783. The first lease purported on the face of it to have been made on the 25th of *March* 1783, in consideration of the surrender of a former lease, which at that time had twenty-eight years to run, and the premises are demised to the lessee to hold from the 25th of *March* then last past. Now it is to be observed, that it is not usual to make a term commence from the year preceding the execution

execution of the lease, and there could be no reason for so doing in this case, inasmuch as the lessee's term under the former lease would continue until he surrendered it to the lessor, which probably he would not do until or about the time when the new lease was executed. I should conclude from the very terms of the habendum, that the lease was not executed until some time after the 25th of *March* 1783, and the mode in which the rent is reserved, leads to the same conclusion. Two rents are reserved, the one payable to *Gooding* the elder, the other payable to his sons; they are both made payable *quarterly* during the term, but it is expressly stipulated that the latter rent is to begin to be payable on the 24th *June* then next. This shews that the parties contemplated that the term was to commence on the 25th *March* 1783. Then there is a memorandum written near the attestation, and signed by all the lessors, whereby they say, "that to prevent disputes they had indorsed the same from *Lady-day* 1783." The meaning of that phrase is not very precise. Whether they intended to declare by that memorandum that the lease was to take effect from that date, or whether it referred to any other indorsement, is not very clear; but giving any sense to the memorandum, we must infer that it was not written until after *Lady-day* 1783. If it refers to any other indorsement made on the lease, it must refer to the words on the back of the lease, "dated the 10th of *May* 1783." I incline to think that the memorandum refers to an indorsement already made on the lease, and it is then evidence against the lessors, that they authorized that indorsement to be written on the lease, and consequently that the lease was not executed until *May* 1783. Upon the whole I am

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of opinion that there was evidence to shew that the lease was not executed until the 10th *May* 1783, and, consequently, that the term began to run from the 25th of *March* preceding.

BAYLEY J. The defendant occupied these premises from *May* 1817 to *May* 1818, and was liable to pay some person for the occupation during that period. The persons claiming under *Gooding* or *Walker* are the only persons who can claim the rent. *Walker* or his assigns may claim if the term continued till *March* 1818, but it is contended that it expired in 1817, and, consequently, that *Walker* or his representatives cannot claim the rent becoming due after that period. The lease on the face of it purports to have been made on the 25th of *March* 1783, and the words of the habendum are, "to hold from *Lady-day* now last past." It is said, therefore, that the term granted by the lease began necessarily to run from *Lady-day* 1782, and expired on *Lady-day* 1817. It may, however, happen, that the lease may be dated on one day and may, in fact, have been executed on a subsequent day; and if that be so, the lease takes effect from the day of the delivery, and not from the date. That is laid down in *Clayton's* case, 5 Co. 1. There indentures of demise were ingrossed, bearing date the 26th of *May*, the 25th *Eliz.* habendum for three years from henceforth, and the said indentures were delivered at four o'clock of the afternoon the 20th day of *June* in the same year, and the question was, when this lease by computation should have its beginning, whether from the day of the date, or from the delivery; "and it was resolved, that *from henceforth* should be accounted from the day of the delivery of the indentures, and not by

any computation of date, for *from henceforth* is as much as to say, "from the making, or from the time of the delivery of the indentures," or a *confectione præsentium*, for the confection or making of the lease does begin by the delivery, and these words, "*from henceforth*, or any other words of the indenture are not of an effect or force until delivery quia traditio loqui facit chartam." Now apply the doctrine of that case to this. Here the lessee was to hold from the 25th of *March* then last past. Now, according to *Clayton's* case, that must mean the 25th of *March* preceding the execution of the lease, and not preceding the date of the lease. There must, however, be some evidence to shew that the deed was not executed on the day when it bears date, and I think there is such evidence in this case. In the lease there is a memorandum by the only persons who had an adverse interest, that they had indorsed it from *Lady-day* 1783, and it appears that on the back of the lease there are the words "dated the 10th of *May* 1783." This is a declaration by them that the lease was not executed until after *Lady-day* 1783, and if they had made a verbal declaration that the lease was not executed until after the 25th of *March* 1783, it would be evidence of the fact against them. Here we have a declaration in their own handwriting. I am of opinion, therefore, that we are well warranted in assuming that the lease was executed after the 25th of *March* 1783. That being so, the verdict is right, and this rule must be discharged.

HOLROYD J. The question is, whether there was reasonable evidence to satisfy the jury that the lease was executed after the time when it purports to bear date. For it is clearly established, that if it be executed afterwards, it takes effect from the day of the delivery, and

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not from the day of the date: and I take it to be clear that a party may shew that the deed was delivered on a different day from that on which it bears date, *Oshey v. Sir Baptist Hicks*. (a) In covenant upon an indenture dated the 9th of *October*, to pay for goods then laden, or afterwards to be laden on board such a ship, it was held that the defendant might traverse the delivery on the 9th, and plead that the deed was sealed and delivered on the 28th, and that no goods were then or afterwards shipped, for he was not bound to pay for any goods shipped after the date and before the delivery of the deed; and it was held, that although it should be intended that every deed was delivered on the day it bears date, unless the contrary be proved, yet that the words of the deed, that he should pay for the corn *then* laden, referred to the time of the essence of the deed by the delivery, and not to the date. Then that being so, the only question is, was there evidence to satisfy the jury that the deed was executed after the time it purported to bear date? I am satisfied that from the indorsement it may reasonably be collected that it was executed after the time when it purports to bear date, and therefore the rule for entering a nonsuit must be discharged.

LITLEDALE J. It appears to be clearly established, that if a lease be executed on a day after the day of the date, it takes effect from the day of delivery, and not from the day of the date. My doubt has been, whether in this case there was evidence to shew that the lease was executed after the 25th of *March* 1783. I am inclined, however, to think that there was evidence from which a jury

(a) *Cro. Jac.* 265.

might reasonably draw the conclusion, that the lease was not executed until after the 25th of *March* 1783, and that being so, then the lease took effect from the 25th of *March* preceding the execution.

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against
MART.

Rule discharged.

SKYRING, Administratrix of G. SKYRING, against
GREENWOOD and Cox.

Monday,
June 6th.

ASSUMPSIT for money had and received by the defendants to the use of *G. Skyring* in his life-time, and to the use of the plaintiff, as administratrix since his death. Plea, general issue. At the trial before *Abbott C.J.*, at the *Middlesex* sittings after last *Michaelmas* term, the following appeared to be the facts of the case: The plaintiff was administratrix of the late *G. Skyring*, who was major in the Royal Artillery. The defendants were paymasters of the Royal Artillery, and held their office by commission, as other officers in the corps hold theirs. The pay of the whole army was fixed by regulations established in 1806. These regulations were made known to the different branches of the army by general orders issued from the respective proper departments, and the general order for the ordnance or artillery issued from the head quarters at *Woolwich*, in *August* 1806, in these words: "His Majesty having been most graciously pleased to express his

The paymaster of a military corps had given credit in account to an officer in that corps from the 1st *January* 1817 to the 5th *November* 1820, for certain increased pay, erroneously supposed to be granted by a general order of the 27th *August* 1806 to an officer of his situation, and a statement of that account was delivered to the officer in 1821. In *December* 1816, the paymasters were informed by the board of ordnance that the increased pay granted by the order of

1806 would not be allowed to persons in the situation of the officer in question. The paymasters did not communicate this information to the officer until 1821, and subsequently to that time they continued to receive his pay: Held, in an action brought by his personal representative to recover such pay, it was not competent to the paymaster to retain any such sums of money on account of the sums which they had credited him for by way increased pay, and which they had allowed him to consider his own for so long a period of time.

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approval of the classes of officers, non-commissioned officers, and gunners of the royal regiment of artillery partaking of the advantages in point of pay granted to the infantry, as far as the several ranks of one service correspond with those of the other, to commence from the 1st of *July* 1806; the following rate of increase to the pay is announced in orders, and attaches to the invalid battalions, marching battalions, horse brigade, foreign and the king's *German* artillery, viz. (amongst other ranks) captain and second captain 1s. 1d. per diem, two shillings per diem more to captains having the brevet rank of major or any superior rank, adjutants and quarter-masters who hold two commissions are not entitled to the increase of pay. First gunners are entitled to the same increase of pay as gunners. The above increase of pay and allowances to officers are granted under the same restrictions as the allowance of one shilling a day, added to the pay of subalterns in 1797, and, consequently, the difference between the former and increased rates is not in any case to be received by an officer holding more than one military commission or appointment, nor to give claim to any higher half pay on reduction." The regulations of 1797 were likewise published by a general order, dated the 28th of *July* in that year, and were in the following words: "His Majesty is graciously pleased to order, that from the 25th of last month, an allowance of one shilling per diem shall be made to each captain, first lieutenant, adjutant, and quarter-master belonging to the marching and invalid battalions of the royal regiment of infantry artillery not holding another commission." *G. Skyring* was a captain in the royal regiment of artillery, having also the brevet rank of major before
the

the 1st of *January* 1817, and from thence to the 5th of *November* 1820, when he obtained the regimental rank of major, and during the same time had the appointment of brigade-major of the garrison of *Gibraltar*. There was a running account between Major *Skyring* and the defendants from the 1st of *January* 1817, to the 31st of *December* 1820, in which credit was allowed to him for his pay to the 5th of *November* 1820, including therein 1s. 1d. per day increase of captain's pay granted by the order of the 27th of *August* 1806, from the 1st of *January* to the 31st of *December* 1817, amounting to 19l. 15s. 5d., and two shillings a day increase granted by the same order to captains having the brevet rank of major, from the 1st of *January* 1817, to the 5th of *November* 1820, amounting to 140l. 10s., which two sums make together 160l. 5s. 5d., and a statement of that account was delivered to Major *Skyring* early in 1821, and there appeared due to him on the balance thereof 116l. 9s. 7d. Major *Skyring* was allowed credit for these sums of 1s. 1d. and 2s. a day in the account, in conformity with the usage which prevailed in paying other officers of the regiment having the same rank and appointment during the same period, and which had prevailed from the date of the general order of the 27th of *August* 1806, and according to which all such payments have been allowed by the Board of Ordnance in the account of the defendants with them to the 31st of *December* 1816.

The Board of Ordnance, in *December* 1816, intimated to the defendants that they would not allow any payments of the 1s. 1d. and 2s. a day to officers having the rank and appointment which Major *Skyring* had, and that the same were not warranted by the order of 1806; but this intimation was not communicated to Major

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Skyring otherwise than by the defendants ceasing to allow him credit for the 1s. 1d. a day after the end of 1817, and writing to him the following letter, dated the 8th of *May* 1821. "Sir, — We beg to acquaint you that a deduction has been made by the Honorable Surveyor General from your regimental pay, and which has been confirmed by the Board, of 391*l.* 14*s.* 5*d.*, being the increase of 1s. 1d. and 2*s.* brevet per diem, granted by the regulations of 1806, but to which it appears you were not entitled, having held the appointment of brigade-major at *Gibraltar* from the 1st of *July* 1806 to the 5th of *November* 1820, in addition to your commission as an officer of artillery. We have, therefore, to request you will make a remittance for the above sum. Memorandum. Increase pay 1s. 1d. 1st of *July* 1806 to 31st of *December* 1816, and brevet pay 2*s.* per day, 4th of *June* 1813 to the 5th of *November* 1820."

The sum of 391*l.* 14*s.* 5*d.* mentioned in that letter, included the 160*l.* 5*s.* 5*d.* hereinbefore mentioned. The Board of Ordnance refused to allow the defendants any payments of the 1s. 1d. and 2*s.* a day subsequent to the 31st of *December* 1816. The running account between Major *Skyring* and the defendants was continued to the 6th of *December* 1822, the day of his death, during which time his pay and various sums on other accounts received and paid by the defendants by his order, were placed to his account, but no statement of the account was delivered to him by the defendants.

The defendants, after the death of Major *Skyring*, delivered to the plaintiff a statement of their account with him to the day of his death, in which they brought forward, and amongst other items allowed him credit for
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the 116*l.* 9*s.* 7*d.* balance due on the former statement of the account, and charged him with the aforesaid sum of 391*l.* 14*s.* 5*d.*, which included the 160*l.* 5*s.* 5*d.* as aforesaid. But the charge of 391*l.* 14*s.* 5*d.* has been since reduced by the defendants to the said 160*l.* 5*s.* 5*d.*, which latter sum the defendants claimed a right to retain, on the ground of their having by mistake allowed to Major *Skyring* 1*s.* 1*d.* a day from the 1st of *January* to the 31st of *December* 1817, and 2*s.* per day from the 1st of *January* 1817 to the 5th of *November* 1820, making the amount of 160*l.* 5*s.* 5*d.*, as ordnance pay beyond the amount of which the ordnance regulations entitled him to. Upon these facts the Lord Chief Justice was of opinion, that the account rendered by the defendants in 1821 was an admission by them that they had received the allowances in question on account of the plaintiff, and that they were not entitled afterwards to rescind the admission, because they had received a communication in 1816 from the Board of Ordnance that those additional allowances would not be allowed, and they never communicated that intimation to Major *Skyring*, and under these circumstances a verdict was found for the plaintiff. A rule nisi having been obtained for a new trial,

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Scarlett and *Bingham* now shewed cause. The defendants are not entitled to set off the sums which they have allowed Major *Skyring* in account, although, according to the true construction of the order, they may not have been due to him of right. If the defendants had actually paid those sums to Major *Skyring* with a full knowledge of all the facts of the case, but under a mistaken view of his right, they could not afterwards have recovered

1825. recovered them back, *Bilbie v. Lumley* (a), *Lowry v. Bourdieu* (b); and the reason of this rule of law is given by Gibbs C. J. in *Brisbane v. Dacres*. (c) That was an action against the widow of Admiral *Dacres*, to recover a sum paid to him by Captain *Brisbane*, as his share of certain freight for the carriage of bullion, which share he was entitled to according to an old usage prevailing in the navy, though not according to a practice introduced recently before the payment, but overlooked by the parties. Gibbs J., Heath J., and Mansfield C. J., agreed against *Chambre J.* that the action could not be maintained. Gibbs J. there says, "I think that where a man demands money of another as a matter of right, and that other with a full knowledge of the facts upon which the demand is founded, has paid a sum, he never can recover back the sum he has so voluntarily paid. It may be, that upon a further view he may form a different opinion of the law, and, it may be, his subsequent opinion may be the correct one. If we were to hold otherwise, many inconveniences may arise; there are many doubtful questions of law: when they arise, the defendant has an option, either to litigate the question, or to submit to the demand, and pay the money. I think that by submitting to the demand, he that pays the money gives it to the person to whom he pays it, and makes it his, and closes the transaction between them. He who receives it has a right to consider it as his without dispute: he spends it in confidence that it is his; and it would be most mischievous and unjust, if he who has acquiesced in the right by such voluntary payment, should be at liberty, at any time within the statute of

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(a) 2 East, 469.

(b) Doug. 467.

(c) 5 Tunt. 143.

limitations,

limitations, to rip up the matter and recover back the money. He who receives it is not in the same condition: he has spent it in the confidence it was his, and perhaps has no means of repayment." It is true, that in this case the money has not been actually paid into the hands of Major *Skyring*, but he was allowed credit for it in the account delivered to him in 1821, and he was thereby led to suppose that he was entitled to treat it as his own. The reasoning of *Gibbs J.* applies equally to a case where the money has been allowed in account, as to one where it has been actually paid; for a party to whom an account is delivered by his agent, calculates his expences with reference to that account. The allowance of these sums in account is equivalent to payment. In *Jeffs v. Wood* (a), it was held that the set-off of one sum of money against another upon the balance of account amounted to payment. Here too the defendants were informed in 1816 that the Board of Ordnance would not allow these sums to persons in the situation of Major *Skyring*, and they never communicated that fact to him until 1821. If they had informed him at that time that the sums were not to be allowed, he would not have treated them as his own property.

They then proceeded to argue, that the defendants by reason of their character of paymasters were estopped by the account they had rendered, from saying that the money which they had allowed in account was by mistake. The paymaster receives the money due to the corps from government, and when he has once represented to an officer by an account rendered, that he has

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received money on his account, he is estopped from afterwards saying that he has not received such money.

But it is unnecessary to report the arguments on this point, as the judgment of the Court proceeded entirely on the first ground.

Gurney and Tindal contra. It must be admitted, that if the defendants had paid these sums to Major *Skyring* with a full knowledge of all the facts, they would not be entitled to set them off, but here there never was any payment. That distinguishes this from the several cases cited. Here the defendants have merely rendered an account, in which they have, by mistake, allowed the deceased credit for sums to which he was not entitled, and they ought in justice to be permitted to correct the error when they discover it.

ABBOTT C. J. It is not necessary to decide in this case, whether the defendants by reason of their character of paymasters are estopped, by the account which they have rendered, from saying that there was a mistake in it. The opinion which I entertained at the trial was founded on a particular fact in this case, and that opinion remains unaltered. The defendants, as paymasters, received sums from government generally on account of the corps, and an order having been issued for an increase of pay, they rendered an account to Major *Skyring* in 1821, in which they gave him credit for the increased pay to which they supposed him to be then entitled, and upon that account there appeared to be due to Major *Skyring* a balance of 116*l.* 9*s.* 7*d.* If he had drawn a bill upon them for that amount, it probably would have been paid, and if they had paid the money

it is quite clear that they could not afterwards have recovered it back, on the ground that according to the true construction of the order it was not due to Major *Skyring*; and if the defendants could not have recovered it back, they ought not now to be allowed to set it off. The defendants afterwards continued to receive further sums on account of Major *Skyring*, and the money so subsequently received by them must be considered as paid off, if they are entitled to bring back into the account the sums which they had given him credit for, in respect of the increased pay. The particular fact in this case upon which my judgment proceeds is, that the defendants were informed in 1816 that the Board of Ordnance would not allow these payments to persons in the situation of Major *Skyring*, but they never communicated to him that fact until 1821, having in the mean time given him credit for these allowances. I think it was their duty to communicate to the deceased the information which they had received from the Board of Ordnance; but they forbore to do so, and they suffered him to suppose during all the intervening time that he was entitled to the increased allowances. It is of great importance to any man, and certainly not less to military men than others, that they should not be led to suppose that their annual income is greater than it really is. Every prudent man accommodates his mode of living to what he supposes to be his income; it therefore works a great prejudice to any man, if after having had credit given him in account for certain sums, and having been allowed to draw on his agent on the faith that those sums belonged to him, he may be called upon to pay them back. Here the defendants have not merely made an error in account,

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account, but they have been guilty of a breach of duty, by not communicating to Major *Skyring* the instruction they received from the Board of Ordnance in 1816; and I think, therefore, that justice requires that they shall not be permitted either to recover back or retain by way of set-off the money which they had once allowed him in account.

BAYLEY J. This may be a case of hardship upon the defendants, but they have brought it upon themselves. This is an action for money had and received. If the defendants are entitled to set off the sum they claim, the action is not maintainable. From the year 1816 to 1821 the defendants had given credit for certain sums, as if Major *Skyring* was entitled to them. I think they were guilty of a neglect of duty in not communicating to him the information they had received from the Board of Ordnance in 1816. Suppose that the balance of the account delivered in 1821 had been paid to Major *Skyring*, and that no subsequent pay had been received for his use by the defendants, and that they had brought an action to recover back the money paid. It would have been a good defence to that action to say that the defendants had voluntarily advanced money to the deceased when he asked no credit, and that they had told him that they had received the money for his use, and that on the faith of their representation he had drawn it out of their hands as his own money, and had been induced to spend it as such; and if they could not recover the money back, neither ought they now to be allowed to retain other monies belonging to the deceased, upon the ground that they have paid or allowed him in account money which they had not in fact received to his use,

use, but which they suffered him to consider his own for a long period of time. I think they cannot now be permitted to say, that the money which they allowed him in account as money received by them to his use, was not money received to his use. The rule for a new trial must therefore be discharged.

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HOLROYD J. The present action is brought for money had and received by the defendants to the plaintiff's use, subsequently to the communication made by the Board of Ordnance to the defendants, and of which the deceased was not informed till 1821. The plaintiff has a right to recover, unless the defendants have a debt to set off. Now Major *Skyring* had a right to expect that money belonging to him would be received by defendants for him, and that all payments made by them were on account of monies so received by them. Suppose that *Greenwood* and Co. had paid Major *Skyring* the balance of the account in 1821, and that no money belonging to him had come subsequently to their hands, they could not have recovered that money back, on the ground that they had paid it to him under a mistaken notion that he was entitled to it. A payment, therefore, made under such circumstances, would not create a debt between the defendants and Major *Skyring*. Here, it is true, the defendants did not pay the balance. But they now say, that some of the money which they paid to Major *Skyring* was not paid to him, on account of monies received for him by them, but was paid by them under the mistaken notion that he was entitled to it, and, therefore, that such payment constituted a debt from Major *Skyring* to them, which they are now entitled to set off; but I think, for the reasons already given, it did not constitute a debt, and that being so, the plaintiff is entitled to recover.

Rule discharged

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A. being a commissioned officer on full pay in a regiment, was appointed civil superintendant of a colony, and at the same time was appointed to the command of such of his majesty's subjects as then were armed or might thereafter arm for the defence of the settlers in the colony: Held, that the appointment to command all persons armed in defence of the settlers in the colony, vested in him the right to command the military forces there.

After he had acted as military commander there for some years, the regiment in which he held a commission was disbanded, and he was put upon half-pay. Both before and

after the disbanding of the regiment, he acted as military commander and civil superintendant of the colony, and he was recognised as filling both characters by the authorities at home: Held, that although by the disbanding of the regiment he lost his commission and rank in the regiment, the right to command the king's troops at the colony continued, and therefore that he was justified in putting under arrest, for disobedience of orders, a commissioned officer on full pay, holding equal regimental rank with himself.

TRESPASS for false imprisonment. Plea, that defendant was a commissioned officer, viz. a lieutenant-colonel in the army of the king, and as such officer, was employed in the service of the king, and had the military command, conduct, care, government, and direction of certain land forces of the king, then being employed in the service of the king in parts beyond the seas, to wit, at *Honduras*, in *North America*; and that plaintiff was a commissioned officer, viz. a major in the army of the king, and as such officer, was employed in the service of the king, and serving amongst the said land forces of the king at *Honduras*, and was under the military orders and command, and the government and direction of the defendant as such officer as aforesaid at *Honduras*; and that defendant being such officer, and being so employed, and having such command, &c., as aforesaid, and plaintiff being such officer as aforesaid, and so employed, and serving and being under such orders, &c., as aforesaid, plaintiff, a little before the time in the first count mentioned, to wit, on the same day and year, did, contrary to his duty as such officer, endeavour to excite and stir up a mutiny amongst the forces of the king at *Honduras*, in breach of good order and military discipline, whereupon the defendant

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put the plaintiff under arrest, &c. The third plea, instead of charging that the plaintiff endeavoured to excite mutiny, stated that he did without any lawful authority assume to himself the command of the land forces at *Honduras*. The fourth plea stated, that the plaintiff refused to obey a certain military order of the defendant as such officer as aforesaid, which order extended to the plaintiff in relation to his duty as such officer as aforesaid, and which order it was the plaintiff's duty to have obeyed. There were other pleas which stated the defendant to be his majesty's commandant of the garrison at *Honduras*.

Replication, de injuria and a new assignment, that defendant on other times and on other occasions, and for a much longer time than was lawful or necessary for the causes in the pleas mentioned, to wit, on the 1st *June* 1820, and from thence continually for a long time, to wit, for nine months thence following, wrongfully imprisoned the plaintiff without any lawful authority, or any reasonable or probable cause whatsoever. There were several special pleas to this new assignment which it is unnecessary to mention.

At the trial before *Abbott C. J.*, at the *London* sittings after *Trinity* term 1824, the following appeared to be the facts of the case. In *July* 1814, the defendant then being a major in the 7th *West India* regiment, was appointed by the Duke of *Manchester*, the then governor of *Jamaica*, his majesty's superintendant of the *British* settlement at *Honduras*, and was directed by that appointment to take under his care the interest of his majesty's subjects there; and about the same time he received from General *Fuller*, the commander of the forces in the island of *Jamaica* and its dependencies

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(*Honduras* being one of those dependencies), an appointment in the words following: "I do hereby constitute and appoint you, the said *George Arthur*, to command such of his majesty's subjects as are now armed, or may hereafter arm for the defence of the settlers of the bay of *Honduras*, you are therefore, as commandant, to take upon you the care and charge accordingly." After the defendant received these appointments, he took upon himself these offices, and acted as the military commandant at *Honduras*, and issued all orders as such until he quitted the settlement in 1822. In 1817, he was made lieutenant-colonel of the *York* chasseurs. That regiment was disbanded in 1819, and on the 24th of *August* in that year the defendant knew that they were so disbanded. He continued however to act as military commandant of *Honduras*. The plaintiff, in *March* 1820, was at *Honduras*, and at that time had been promoted to the rank of lieutenant-colonel in the 2d *West India* regiment, and was on full pay, and thinking that the defendant, in consequence of the disbanding of the *York* chasseurs, had become incapable of holding any military command, and that the right, therefore, to command the troops devolved upon him as the officer next in rank, the plaintiff refused to obey an order issued by the defendant, for convening a general meeting of the officers at *Honduras*, at ten o'clock on the 23d of *May* 1820, and issued a counter order convening a meeting of the officers at his, the plaintiff's quarters, at ten o'clock on the same day. By an order issued by the defendant, the plaintiff was put under arrest for having refused to attend at the government house on the 23d of *May*, and for having presumed without any authority to assume the command of the troops, and as such, to issue garrison orders. It appeared further by

the evidence of Sir *Henry Torrens*, Sir *Herbert Taylor*, and other military men, that according to their understanding, when an officer holds a commission in a regiment, and has also a military command in a settlement, the latter is not affected by the disbanding of the regiment to which he belongs, but that the general military command continues after the regiment is disbanded, although his rank in the regiment is at an end. Some of the witnesses stated that the very office of superintendent carried with it a military command. This evidence was objected to by the plaintiff. It was further proved that the commander of the forces at *Jamaica* had the right to appoint a military commandant at *Honduras*, and that the defendant was recognised in the settlement, and by the authorities at home as the military commandant of *Honduras*, both before and after his regiment had been disbanded. After the arrest of the plaintiff, the defendant transmitted dispatches on the subject to General *Walker*, the then commander of the forces in *Jamaica*, and the latter transmitted the same to the commander-in-chief for his direction as to the course to be pursued under the circumstances, and in the result the plaintiff was dismissed from his majesty's service. But it appeared that the plaintiff was detained in custody for some time after the defendant knew that he was dismissed from the army. Upon this evidence the Lord Chief Justice was of opinion, that it had been made out in proof, that at the time when the plaintiff was put under arrest the defendant was the commanding officer at *Honduras*, and that the justifications were established; but he left it to the jury to say, whether the plaintiff had not been detained in custody for a longer period than he ought to have been, after the defendant knew

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that he had been dismissed the army. The jury found a verdict for the defendant upon the justifications, and for the plaintiff upon the new assignment with 100*l.* damages. A rule nisi for a new trial was obtained by the plaintiff in last *Michaelmas* term upon two grounds; first, that the evidence of the usage in the army was not admissible; and, secondly, that the defendant having by the disbanding of his regiment lost his commission, had thereby become incapable of holding the office of commandant of the settlement, and consequently was not the commanding officer at *Honduras* at the time when the plaintiff was put under arrest.

The *Attorney-General*, *Gurney* and *Parke*, now shewed cause. The first clause in the mutiny act (*a*) provides, that "any person who shall disobey any lawful command of his superior officer, or shall desert his majesty's service, whether such offence shall be committed within this realm, or in any other of his majesty's dominions, or in foreign parts upon land or upon the sea, shall suffer death, or such other punishment as by a court martial shall be awarded." By the articles of war it is made imperative, "that whenever any officer or soldier shall commit a crime deserving a punishment, he shall by his commanding officer be put in arrest if an officer, or if a non-commissioned officer or soldier, be imprisoned until he shall be either tried by a court martial, or shall be lawfully discharged by a proper authority." Now it is admitted that there was a lawful command, and a disobedience of that command; and the only question is, whether colonel *Arthur* was or was not the superior officer at the time of giving this order. The mutiny act enables the king to have a standing army in time of peace, and

(a) See 58 G. 3. c. 11.

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the king governs it by virtue of his prerogative, by which he has the sole command of all the forces in the kingdom. The king may appoint all the subordinate officers in the army. Their relative rank depends upon him. There is no written law by which relative military authority is ascertained; it is established by the usage of the army entirely. The question in this case therefore was, what was the usage and practice of the army recognised by the crown? Now, the evidence established, that the usage and practice was to appoint officers to special commands who held regimental commissions before; and that, if at the time of their appointment to the special command, they held regimental commissions, their new appointment did not cease with their regimental commission. If, therefore, this usage and practice was properly admitted in evidence, it establishes the defendant's case. Now *Barois v. Keppel* (a) is an authority to shew that this evidence was properly received. That was an action brought by a serjeant of the guards against the commanding officer, who was a major commanding the battalion, for reducing him to the ranks, in consequence of the disobedience of an order; and by the articles of war, "non-commissioned officers may be discharged as private soldiers, either by order of the colonel of the regiment or by the sentence of a regimental court martial." In the special case it was stated that it was generally understood in the army, that the whole power of the colonel devolves in his absence on the commanding officer for the time being, and that, in fact, such commanding officer ranks as colonel, and always acts as such; that by the constant custom and practice of the army, the commanding officer for the time being had always made serjeants, and

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(a) 2 Wils. 514.

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broke and reduced them in the same manner as the colonel himself might have done if actually present. In that case, therefore, the usage of the army was stated as a fact. Here the defendant was duly appointed superintendant of *Honduras*, and being then a military man, the very office of superintendant carried with it the supreme military command. Next there was the appointment of General *Fuller*, and it appears by the evidence that General *Fuller* had power to appoint a military commandant. Besides, after the appointment was made, the defendant was recognised by the authorities at home as the commandant, they having corresponded with him after the disbandment of the regiment. And the articles of war allude to the power of inferior officers to grant commissions. By the second article, "colonels, majors, captains, and other inferior officers serving by commission from the governors, lieutenants, or deputy governors, or presidents of the council for the time being of our said provinces, and colonels in *North America*, shall on all detachments, courts martial, or other duty wherein they may be employed in conjunction with our regular forces, have rank next after all officers of the like rank serving by commissions." The written law of the army, therefore, alludes to that power of granting commissions, which was proved to exist in this case.

Brougham, Evans, and Cameron contra. The defendant is entitled to retain his verdict upon the justifications if it has been proved that he was a military officer, having the military command over the plaintiff at the time when the latter was put under arrest. There are two ways in which a man may fail to have the military command which he assumes to have; he may be incapable of holding the
 command

command by whomsoever he pretends to have been appointed, or he may not have been appointed whether he were capable of holding it or not. It is not disputed that the crown has the power to appoint any person, even a mere civil person, to a military command. But the crown did not delegate either to the civil governor of *Jamaica* or to the military commandant there, the power of granting commissions, and it may be questioned whether such an authority could be delegated. By the statute 13 & 14 *Car. 2. c. 3. s. 2.*, authority is given to lord lieutenants of counties to grant commissions in the militia. Now this shews that it required the authority of parliament to enable a subject to grant commissions. The *East India* company, who have the government and the territorial authority in *India*, yet have a special authority, by statute, to grant commissions to cadets to hold military appointments. Formerly the lord high admiral had authority to grant commissions, but when lords commissioners were appointed to execute the office of lord high admiral, there was a difference of opinion among lawyers, whether the lords commissioners had authority to grant commissions; and the statute of 1 & 2 *William & Mary, stat. 2. c. 2. s. 2.*, declared that they should have the same power in that respect as the lord high admiral. But assuming that the crown might delegate the power to grant commissions, that power was not delegated to General *Fuller*. There was no evidence of such delegation, and it could not properly be assumed, but ought to have been proved by the defendant. One of the pleas states that the defendant was his majesty's commandant of the forces at *Honduras*. There is no such rank in the army as commandant; it is a term which applies to the senior officer in the place. If this be a mere appoint-

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ment and not a substantive commission, then it might be contended that an officer with a mere appointment might command a commissioned officer. By the mutiny act, none but commissioned officers can sit upon courts martial. By sect. 18 of the articles of war, "all commissions granted by the king, or by any of his generals from him, shall be entered in the books of the secretary at war or commissary general, otherwise they will not be allowed of." Now it was not shewn that the defendant's commission was granted by a general, or that it was entered in the books of the secretary at war or the commissary general. As a commission, therefore, it was clearly void. But supposing that General *Fuller* had the power to grant a commission, he has not exercised it. The commission issued by him to the defendant is, "to command such of his majesty's subjects as are now armed, or may hereafter arm for the defence of the settlers." Now this is not the language used by the crown when it grants a military command. The words used by the crown in conveying military commissions to military persons are, "to command officers and soldiers, forces and armies," and those words are used in the mutiny act and the articles of war to denote a military force; but the words used in General *Fuller*'s commission describe volunteers or settlers, who arm to repel the violence of the natives or foreign enemies. Assuming, however, that General *Fuller* had power to grant a military command to a military person, and that the defendant at one time was entitled to the command, still as it was proved that his regiment was disbanded before the time when he caused the plaintiff to be arrested, he had then ceased to have any right to command the troops. It is admitted that he was not any longer liable to martial law. Now, no person can command military

men, as a military man, unless he is liable to the same law and government. It would be a monstrous proposition to say that a man could govern others by martial law, he himself not being subject to the same law. It is said, that a man who has once been in the army does not lose his military character by being placed upon half pay. But *Bowler v. Owen* (a) is an authority to the contrary. There the defendant was an out-pensioner of *Chelsea College*, and the question was, whether or not he was entitled to the benefit of the clause in the mutiny act, whereby a soldier or officer in His Majesty's service was not liable to be arrested unless he owed a sum of money to a certain amount. The Court held he was not, being under no military discipline, and subject only to the control of the commissioners.

The evidence of usage was inadmissible, for the question was, whether the defendant was by law the officer in command at *Honduras*, and that must entirely depend upon the rank which he held in the army. *Barwis v. Keppel* (b) is distinguishable from the present case upon three grounds: first, the usage there was made a part of the special case, it could not therefore be the subject of argument or decision; secondly, that was an action on the case for reducing an officer of the guards to a common soldier, and it might be proper to adduce usage to shew that there was no malice in doing that which might legally be done; there all that was done was depriving the plaintiff of his pay as serjeant, but here the plaintiff was deprived of his liberty. In *Grant v. Sir Charles Gould* (c) Lord *Loughborough* says, "where martial law prevails, the authority under which it is exercised claims jurisdiction over all military persons, in all circumstances. Even their debts are subject to

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(a) *Barnes's Notes*, 432.(b) 2 *Wils.* 314.(c) 2 *H. Bl.* 98.

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inquiry by a military authority: every species of offence committed by any person who appertains to the army is tried not by a civil judicature, but by the judicature of the regiment or corps to which he belongs." *Barwis v. Keppel* was decided upon the distinction which was adverted to by Lord *Loughborough* in *Grant v. Gould*. The plaintiff and defendant there were subject to martial law, and not to the civil law; and in that case the Court said, "By the act of parliament to punish mutiny and desertion, the king's power to make articles of war is confined to his own dominions; when his army is out of his dominions, he acts by virtue of his prerogative, and without the statute or articles of war." Now that case was cited to shew that usage was a criterion to construe the mutiny act and articles of war, although the Court expressly say that the king acted by virtue of his prerogative, and without the statute or articles of war. In *Sheppard v. Gosnold* (a) the question was, whether goods saved from wreck were liable to tonnage and poundage. The Lord Chief Justice, after shewing that the words of the statute did not apply to the case, says: "The second objection is, that the king's officers, by usage, have had in several kings' times, the duties of tonnage and poundage from wrecks. We desired to see ancient precedents of that usage, but could see but one in the time of King *James*, and some in the time of the last king, which are so new that they are not considerable. Where the penning of a statute is dubious, long usage is a just medium to expound it by; for *jus et norma loquendi* is governed by usage, and the meaning of things spoken or written must be, as it hath constantly been received to be, by common acceptation. But if usage hath been against the obvious meaning of an act of parliament, by the

(a) *Vaughan*, 159.

vulgar and common acceptation of the words, then it is rather an oppression of those concerned, than an exposition of the act, especially as the usage may be circumstanced. As, for instance, the customers seize a man's goods under pretence of a duty against law, and thereby deprive him of the use of his goods until he regains them by law, which must be by engaging in a suit with the king; rather than do so he is content to pay what is demanded for the king. By this usage all the goods in the land may be charged with the duties of tonnage and poundage; for when the concern is not great, most men (if put to it) will rather pay a little wrongfully than free themselves from it over-chargeably." Now the reasoning of the Lord Chief Justice applies to the present case, for if there was danger in that case that persons should submit to an ancient poundage, there is much more danger that persons who are liable to be discharged from the army at a moment's notice should submit to a pretended usage although set up for the first time.

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ABBOTT C. J. I am of opinion that in this case the rule for a new trial must be discharged. It does not appear to be questioned that at the time when the defendant received his appointments, whatever their nature might be, from the Duke of *Manchester* and General *Fuller*, he was a person capable of receiving an appointment to a military command. Indeed that could not be disputed, because he was then an officer holding a commission in His Majesty's army on full pay. If then he was capable of receiving a military command at that time, the next point is, was any military command given him. He was appointed by the Duke of *Manchester* to be superintendant, which is considered a civil appointment. At the same time, General *Fuller*, who then

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then had the command of the troops on that station, gave him that appointment, upon which much observation has been made. By that he was to take upon him the command of all persons armed or to be armed for the defence of the settlers. It is said those expressions are not conformable to the language used by the crown in military commissions properly so called, and I do not know that they are; but it seems to me they are in themselves clear, and that they necessarily import, that Colonel *Arthur* was to take the military command of the soldiers as well as others; and, therefore, I think, notwithstanding the language of it, we must consider that it was intended to give to him the supreme military command, as connected with the civil superiority conferred upon him by the Duke of *Manchester*. Then it is said that whatever the effect of that might be, yet that as soon as the regiment in which he held the commission was disbanded, and he was put upon half-pay, he ceased to be capable of exercising those military functions which he might have exercised before. Now the command of the army belongs entirely to His Majesty, it is a matter for his discretion and his authority only, except so far as this discretion and authority are regulated and controlled by the statute laws. We must look therefore at the statute only, and to the articles of war, which are an emanation from His Majesty under the statute law, for any illustration of that authority. The mutiny act contains nothing upon this subject. The articles of war do not appear to me to contain any thing that can cast a light upon it. The book called "Rules and Regulations for the Government of the Army" is not a book of which we can take judicial cognizance. (a) We are required to take judicial notice of the articles of war, but

(a) This book had been adverted to by the defendant's counsel in the course of the argument.

we are not required to take judicial notice of any other regulations, and therefore they must be brought before us by proof in the same manner as any other fact. There being then nothing in any act of parliament, or in the articles of war, to shew that a person well appointed in the first instance, as I conceive the present defendant to have been, shall lose his authority as soon as it may happen that the regiment in which he held a commission is disbanded, I think that the authority must be considered to have continuance until the crown thinks proper to put an end to it. The defendant's authority at *Honduras* had no connection with his situation in the regiment. No part of the regiment was stationed at *Honduras*, and if we were to hold that the disbanding of the regiment put an end to his authority, it must put an end to it immediately, and then the greatest mischief would arise; it would, for some time at least, remain uncertain who was to take the command, and if he continued in command, as he would do, until the notification of the fact of disbanding, every act he might do in the interval would be void: the mischief and inconvenience of that would be so great, that unless we are informed by some fixed proposition of law that, having authority to hold such an appointment, his authority ceased upon the disbanding of the regiment, the argument must fail. It appears to me therefore that having been well appointed in the first instance, his authority continued, notwithstanding the disbanding of the regiment, until it was the pleasure of His Majesty to put an end to that authority by appointing some other person, or withdrawing this officer. Nothing of that kind was done. I do not rely to any great extent upon the opinions given to us at the trial, although they came from very high authority as the opinions of experienced individuals;

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individuals; but this fact we had most distinctly in evidence that, notwithstanding the disbanding of the regiment to which the defendant belonged, he corresponded with the authorities at *Jamaica*, and with the authorities in this country, in the same way as before, and was recognized by those authorities as still continuing to hold the command. That recognition by the authorities at home appears to me clearly a recognition by His Majesty, because when in consequence of the unfortunate dispute that has led to the present action, each party applied to head-quarters at home, what was the result? His Majesty himself so far acknowledged the authority of the defendant as to disapprove in the strongest way of the act of the plaintiff in endeavouring to take the command upon himself, and actually to dismiss the plaintiff from his situation, which is a direct recognition by the King himself that the defendant, notwithstanding the disbandment of that regiment, of which he was an officer, still continued to have the superior military command. As therefore there is no rule of law or any written authority to prevent us from giving effect to that which is manifest to us as having been the pleasure of His Majesty, having the direction of the army, we are bound to say that the plaintiff was lawfully put under arrest, the result of which is that the pleas of justification were made out in proof, and that the rule for the new trial must be discharged.

BAYLEY J. In this case I think that we are not warranted in saying that the authority communicated to Colonel *Arthur* had terminated, but that it continued down to the period at which the arrest of the plaintiff took place. If the mutiny act or any other act of parliament, or if the articles of war, which have the same effect, had prescribed the power of the commander-in-chief

chief upon the station, and had pointed out to him upon what particular description of persons only the command should be conferred, that act of parliament or those articles of war would have been binding upon General *Fuller* and the Duke of *Manchester*; and any appointment in opposition to them would have been void. I have looked through the mutiny act and the articles of war for the purpose of seeing whether they expressly limited the power of the commander-in-chief as to the persons upon whom the subordinate command is to be conferred; they are perfectly silent in that respect. If they are silent, then we are bound to look at the usage upon the subject, because that usage may assist us in forming our judgment. As to the usage, the evidence was (and it was matter of proof) that you cannot appoint a mere civil individual, by which mere civil individual I mean a person not having any military character. I take the reason of that to be this; that in him you would not expect to meet with that knowledge and those talents that a military command requires; but the evidence in the case is, that so as you do not appoint a civil individual, you are at liberty to appoint a military character, whether upon half pay, or whether upon full pay; and in substance I can see no reason for the distinction between the one and the other. You cannot appoint a civil individual because he will not have the competent skill and judgment, but a half-pay officer will be likely to have as much judgment as a full pay officer, therefore I can see no reason why the power should not be conferred upon him as well as any other individual. The objection to that is, that by the words of the mutiny act there is no power to call to a court martial any person except such as shall be commissioned or in pay as officers. The decision of the Judges that a half pay officer is not liable to a court martial,

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martial, applies, I apprehend, to *unemployed* half pay officers only: they do not come within the words of the mutiny act, which describe such officers as are amenable to a court martial, viz. persons commissioned or in pay as officers. (a) But *employed* half pay officers seem to me to come within the description, because if they have no commission, they are nevertheless in pay as officers. Whether the defendant had any specific pay in this case because he commanded the forces, did not distinctly appear, but it can hardly be supposed that so important a situation was without pay, and I think the words in the mutiny act "in pay," are equivalent to the word "employed." Instead of the position that the defendant could not be employed, because he was not amenable to a court martial, I think the converse is the truth, that he was amenable to a court martial, because he was employed. There is a plain distinction between the case to which I have referred and this case. An unemployed officer has no pay in the character of an officer, and I should apprehend that, in all cases where a party is employed, he has pay as an officer; but I do not find any thing in the mutiny act which says, that the person to whom a command is delegated, must of necessity be liable to a court martial. Whether he received pay or not, I still see nothing in the case which takes away from him the right to continue to hold the appointment after he had once received it. When he was originally appointed, he was certainly in full pay as an officer, he was not upon the spot in the character of a commissioned officer, that is, his regiment was not there, he had no regimental rank in that place, he was a staff officer only, then as a staff officer he would have received pay. Because his regiment, which is at a distance, is disbanded, and

(a) See *Grant v. Sir C. Gould*, 2 H. Bl. 69. where it was held that a person "receiving pay as a soldier was subject to military jurisdiction."

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he ceases to have, with reference to that regiment, any military command; he will not therefore cease to have military skill and military judgment, and it is in respect of that military skill and judgment that he originally gets the appointment in that place. Then having got his appointment in that place from a person to whom, according to all the evidence in the case, the military superintendence is entrusted, namely, General Fuller; is he, because his regimental rank has ceased, to cease to contribute his skill and his judgment in the place in which for that skill and for that judgment he had been originally placed? I think it would be mischievous to the army if we were to hold, that because for purposes totally unconnected with that place, his regiment is disbanded, he should by that accidental circumstance be discharged from all obligation to perform military service in that place, and should be also deprived of the power and privilege of continuing that command until he should be regularly and properly superseded. The crown exercises its judgment as to the persons, who from time to time shall have the command in particular places, and the person under the crown entrusted with the care of a whole district, must from time to time say who shall be the person exercising the military command within particular parts of that district. How mischievous would it be if a man who had the command at a particular place in a critical situation were to cease to command immediately on receiving notice that his regiment, at a distance, was disbanded. The instant it is known that his regiment is reduced, the officer who commands upon the whole district may, if he shall think that is a reason why he shall be superseded, supersede him; he may direct that the com-

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mand shall devolve upon some other person, who will be the proper person to be delegated in that respect, but it would be mischievous if we were to say that the authority is, ipso facto, gone and at an end. I think what has been done afterwards with reference to this individual shews what was the sense of the crown in that respect, and the sense of the crown, unless it militates with the act of parliament by which the rights of the army are regulated, must determine the question. For these reasons it seems to me that the destruction of the defendant's rank in the *York chasseurs* did not destroy the rights he had as commandant at *Honduras*, but that those rights continued; and if they continued, then the plaintiff was mistaken in point of law in supposing that the right had devolved upon him; and when he took upon him to issue an order in opposition to that which had been issued by the defendant, he was assuming that which the law did not entitle him to assume, and was liable to be placed in that situation in which the defendant placed him; and for these reasons I think the plaintiff is not entitled to recover in this action, except upon the new assignment, and that the rule obtained for a new trial must be discharged.

HOLROYD J. I also think that upon the present occasion the justification of the defendant is made out in evidence. It appears to be admitted that at the time he was appointed, he was capable of receiving the appointment, and being capable of receiving the appointment, it appears to me, that although his military office in the *York chasseurs* had ceased, he continued a military character sufficiently capable to hold the other office.

office. But it is urged that that would be attended with mischievous consequences. I must say that those consequences have not occurred to my mind. Then it is said, that this was a mere civil appointment. I think, as far as the power is to be taken to have been given by General *Fuller*, he had a right to exercise it. It was a military station. It arose from the commander-in-chief, and it was military and military only as it appears to me. Then as to the evidence of usage, I think, according to the case cited, such evidence was rightly received. But then it is urged, that the crown had no power to grant to an officer abroad, power and authority to grant commissions, or to enable them to receive appointments. By looking into the articles of war, particularly sections 18. & 22., it appears to be taken for granted that it is within the prerogative of the crown, that not only the crown itself, but also under certain circumstances, a governor may grant commissions and make appointments. In many cases it must be essentially necessary to the service, that some person should be appointed in the interim, until confirmed or sanctioned by the crown. Upon these grounds, I think that the present verdict ought in no respect to be interfered with. The rule for a new trial must therefore be discharged.

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Rule discharged.

LITLEDALE J. having been concerned in the cause while at the bar gave no judgment.

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Monrag,
June 6th.

TANNER against BEAN.

Where, in an action by an indorsee against the indorser of a bill of exchange dishonoured on presentment for payment, the declaration contained an averment that the bill was accepted by the drawee: Held, that this was unnecessary, and that the plaintiff need not prove it.

ASSUMPSIT on a bill of exchange. The declaration stated that one *Challenger* made his bill of exchange and directed it to one *Masters*, that *Masters* upon sight thereof accepted it, that *Challenger* indorsed it to the defendant, who indorsed to the plaintiff. Averment that the bill was presented for payment and dishonoured, and notice given to the defendant. Plea, non-assumpsit. At the trial before *Littledale J.* at the *London* sittings, after *Easter* term, the plaintiff proved that the bill was drawn by *Challenger* and indorsed by him and the defendant, and that it was dishonoured, but he failed to prove that it was accepted by *Masters*. It was thereupon objected that the plaintiff could not recover, for that he was bound to prove the acceptance of the bill according to the allegation in the declaration, although that allegation was unnecessary. The learned judge overruled the objection, and directed a verdict to be found for the plaintiff, but gave the defendant leave to move to enter a nonsuit.

Chitty now moved accordingly, and renewed the objection taken at the trial, and cited *Jones v. Morgan (a)*, where Lord *Ellenborough* held, that where in an action by the indorsee against the drawer of a bill of exchange, the declaration contained an averment of acceptance, the plaintiff was bound to prove it.

(a) 2 *Camp.* 474.

ABBOTT C. J. The holder of a bill is not bound to present it for acceptance before it becomes due, and we are of opinion that the allegation of acceptance is not in the nature of a description of the instrument. The acceptance or non-acceptance does not vary the responsibility of the indorser appearing on the declaration, it is at all events his duty to pay the bill when due, if the prior parties do not. The averment of acceptance was, therefore, immaterial, and the plaintiff was not bound to prove it.

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Rule refused.

Ex parte WILLIAMS.

Monday,
June 6th.

A SUIT for brawling in the parish church of *Tring*, was instituted against *Williams* before the commissary of the Bishop of *Lincoln*, for the arch-deaconry of *Huntingdon*, within which the parish of *Tring* lies. The commissary, by letters of request, transmitted the suit to the arches court of *Canterbury*. The official principal of that court issued a citation, and articles were exhibited against *Williams* who first put in a negative plea, then withdrew it, and put in a plea of justification, and afterwards obtained in this court a rule nisi for a prohibition.

Where a suit for brawling in church is instituted before the commissary of the bishop of the diocese, it may be removed, by letters of request, into the court of arches.

Semble, that brawling was not made an offence by the 5 & 6 Ed. 6. c. 4., but was previously cognizable by the spiritual courts.

Marryat shewed cause. There is no doubt that the court of arches may entertain this suit by letters of request. The statute 5 & 6 Ed. 6. c. 4. may possibly be relied on by the other side. The first section of that act gives jurisdiction, in cases of brawling, to the ordi-

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nary; that does not mean the bishop of the diocese, so as to limit the jurisdiction to him alone, but the ordinary judge. Besides the offence of brawling was not created by the 5 & 6 Ed. 6. c. 4., but a new penalty only was thereby imposed; it was before cognizable by the spiritual courts, *Wenmouth v. Collins.* (a) The party promoting the suit has, therefore, a right to remove it, provided the inferior judge thinks fit. The 25 H. 8. c. 9. s. 3. allows a party to be cited out of the diocese in which he dwells, in case "any bishop, or any inferior judge, having under him jurisdiction in his own right and title, or by commission, make request or instance to the archbishop or his substitutes." At all events, the objection is now too late, the defendant has appeared and pleaded in the spiritual court. [*Abbott C. J.* If it appears that the Court had no jurisdiction, the objection can never be too late.] That is so, but if only the mode of originating the jurisdiction be bad, then the objection should be taken in the first instance.

Denman contra. The last objection to this rule, as to the time when it was obtained, is of no weight, for the ground of the motion was that the letters of request from the commissary could not give any jurisdiction to the court of arches. The 5 & 6 Ed. 6. c. 4. certainly speaks of the offence of brawling as one for which no punishment existed before that time, and then proceeds to give to the ordinary jurisdiction over it. The words are "that it shall be lawful unto the ordinary of the place where the same offence shall be done, and proved by

(a) 2 *Ld. Raym.* 850.

two lawful witnesses, to suspend every person so offending, &c." The power is limited to the ordinary of the place, no right of appeal is any where given. The court of arches, therefore, cannot have any jurisdiction over an offence alleged to have been committed in the diocese of *Lincoln*.

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ABBOTT C. J. Taking this offence to have been created by the 5 & 6 Ed. 6. c. 4. I should think that the authority thereby given to the ordinary is to be exercised in the same manner as any other authority given to that officer. Now one mode of exercising his authority is by letters of request to the archbishop or his substitutes. But in *Wenmouth v. Collins* Lord Holt appears to have been of opinion that the offence of brawling was not created by the statute which has been referred to, and I think that his opinion was correct. If that be so all difficulty is removed, and there can be no doubt that the court of arches may derive jurisdiction from letters of request. This rule must, therefore, be discharged with costs.

Rule discharged with costs. (a)

(a) In *Hilary* term, a former motion for prohibition in this case was discussed. It was moved on the ground that the appeal should have been first from the commissary to the bishop of the diocese, and then to the court of arches. But it appearing that the commissary was the officer of the bishop and the judge of his court, it was held that the suit was in fact originally instituted before the bishop, and that the appeal could only be to the court of arches, and the rule was discharged.

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Tuesday,
June 7th.

GREENING *against* CLARK.

Where *A.* bought of *B.* goods in the *East India* Company's warehouses, and left the warrants in *B.*'s hands, who pledged them, and afterwards became bankrupt whilst the warrants were in the possession of the pawnee: Held, that the goods were not in the possession, order, and disposition of *B.* at the time of his bankruptcy within the 21 *J. l. c. 19. s. 11.*, and that they did not pass to the assignees chosen under a commission issued against him.

TROVER for certain warrants of the *East India* Company for the delivery of a quantity of lac dye and cotton. Plea, the general issue. At the trial before *Abbott C. J.* at the *London* sittings after *Easter* term, it appeared that the plaintiff, in *July* 1823, bought the goods mentioned in the warrants from one *Phillipson*. An invoice was made out, and the price paid by the plaintiff, but the warrants were left in *Phillipson*'s hands. Warrants for goods deposited in the *East India* Company's warehouses are delivered to the owners when the goods are received into the warehouses, and are current in the market, and transferrable without indorsement, and the goods are delivered to the person who brings the warrants to the warehouse. After the sale to the plaintiff, *Phillipson* frequently raised money upon these warrants, depositing them sometimes by way of pledge, at others by way of sale, with a condition for repurchase. In *August* 1824, *Phillipson* deposited the warrants in question, together with others (his own property,) with the defendant, to secure advances made by him. On the 8th of *October* 1824, *Phillipson* became bankrupt, and on the 18th of the same month the plaintiff demanded the warrants from the defendant. The latter not having reimbursed himself at that time, refused to deliver them, whereupon this action was commenced. *Clark* having afterwards sold the goods, which were *Phillipson*'s property, and finding the proceeds more than sufficient to cover his advances, was willing to give
up

up the warrants demanded by the plaintiff, but a commission having in the mean time issued against *Phillipson*, under which assignees had been chosen, and they objecting to such delivery, *Clark* filed a bill of interpleader, and the Vice-Chancellor ordered that the assignees should defend the action as if they had been defendants on the record. Upon this evidence, it was urged for the defendant, that the goods were in the possession, order, and disposition of the bankrupt at the time of his bankruptcy, and therefore passed to the assignees. The Lord Chief Justice was of opinion that they did not so pass to the assignees, and the plaintiff obtained a verdict; and now

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The *Attorney-General* moved for a rule nisi for a new trial. This case is clearly within the meaning and spirit of the 21 J. 1. c. 19. s. 11. That enactment was made to guard against the mischief arising, where traders are enabled to gain credit by having in their possession goods belonging to other persons. The warrants for the goods in question were the symbols of property, and they were current in the market, so that *Phillipson* was apparently the owner of the goods, and as such, obtained credit. [*Abbott C. J.* Must you not shew that the goods were in his possession at the time of the bankruptcy?] For this purpose, the possession of the pawnee was the possession of the bankrupt; the former had no property in the goods, nor could he part with them; he had merely a lien. Suppose the case of goods in a warehouse in the bankrupt's name, subject to a lien for dock dues; that certainly would not take the case out of the statute. This appears to be the same in principle.

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Per Curiam. The effect of the 21 J. 1. c. 19. s. 11. is to render the property of one person, under certain circumstances, available as a fund for payment of the debts of another. Such a statute, although in some cases very beneficial, should not be applied to any that do not come within the words of it. Now the words of the statute are, "that if at any time hereafter any person or persons shall become bankrupt, and at such time as they shall so become bankrupt, shall, by the consent and permission of the true owner, and proprietary, have in their *possession*, order, and disposition any goods or chattels, whereof they shall be reputed owners, &c., that in every such case the commissioners shall have power to sell and dispose of them for the benefit of the creditors." The goods in question certainly were not in the possession of *Phillipson* at the time of his bankruptcy, nor could he have obtained the possession without repaying to *Clark* the money that he had advanced. This case, then, does not fall within the words of the statute; and as without the statute there was no defence to the action, the verdict was properly found for the plaintiff, and ought not to be disturbed.

Rule refused.

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WALDO *against* MARTIN.Tuesday,
June 7th.

COVENANT upon an indenture bearing date 15th of April 1820, whereby defendant covenanted amongst other things, "that he would during the joint lives of himself and the plaintiff render half yearly to the plaintiff, a just and true account of all such sums of money as he should actually receive, or as should come to his hands as bag-bearer or bag-man in the pipe office of his majesty's court of Exchequer. And also that the defendant should and would pay to, or account with the plaintiff for the fees on all such Anglia accounts as were declared by the commissioners for auditing public accounts previous to the 1st of January then last past, and were then in the pipe office. And also should and would divide the net profits of the said office (except such fees as aforesaid,) equally between him, defendant, and the plaintiff, share and share alike." Breach, that the defendant had not accounted to the plaintiff for the monies which came to his hands, nor for the fees on the Anglia accounts, nor had divided with plaintiff the net profits of the office. Defendant craved oyer of the deed, which recited that *James Farrer, Esq.*, as first secondary of the pipe office in the Exchequer, had constituted and appointed the defendant to be bag-bearer or bag-man in that office upon the resignation of the plaintiff, and that the plaintiff resigned the said office upon an understanding between him and the defendant, that the profits thereof, except the fees on the Anglia accounts, should thenceforth be divided equally between him,

A., who held an office for life, in the gift of *B.*, agreed with *C.* to resign, and to procure the appointment for him, and *C.*, in consideration thereof, agreed that *A.* should have a moiety of the profits. *A.* resigned, and through his influence *C.* was appointed, and executed a deed for the performance of the agreement. The agreement was not communicated to *B.* In covenant by *A.* against *C.* for not paying over to him a moiety of the profits of the office: Held, that the agreement was a fraud upon *B.*, and therefore illegal and void.

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him, plaintiff, and the defendant, during their joint lives, and then contained covenants by the defendant for performance of the agreement. Pleas, first, non est factum. Second, that before and at the time, of making the indenture, the plaintiff had held, exercised and enjoyed the place, situation, and office of bag-bearer or bag-man in the pipe office of his majesty's court of Exchequer, the same then and still being an office touching and concerning the administration of justice, to wit, at, &c.; and the defendant further saith, that heretofore, to wit, on, &c., at, &c., it was unlawfully, corruptly, and against the form of the statute in such case made and provided, agreed by and between the plaintiff and defendant, that the plaintiff should resign his said office of bag-bearer or bag-man as aforesaid in favor of defendant; and that plaintiff should procure defendant to be appointed to the said office, on the said resignation upon certain unlawful terms and agreement, to wit, that the profits of said office (except the fees and profits on such Anglia accounts as were declared by the commissioners for auditing public accounts previous to the 1st day of *January* then last past, and were then in the said pipe office), should thenceforth be divided equally between plaintiff and defendant during their joint lives, and that defendant should enter into the said covenants on his part in the said indenture contained; and defendant further saith, that the said unlawful and corrupt agreement having been so made as aforesaid, afterwards, to wit, on, &c., at, &c., in pursuance thereof the plaintiff did relinquish and give up the said office in favor of defendant, and did then and there procure defendant to be appointed to the said office, upon the said resignation, and in lieu and stead of plaintiff, and upon

upon the terms and agreement aforesaid. And for securing the payment of the said moiety of the said fees of said office of bag-bearer or bag-man as aforesaid, to be paid to him, the plaintiff, by defendant, during their joint lives; defendant then and there, to wit, on, &c., at, &c., did seal, and as his act and deed, deliver the said supposed indenture in the declaration mentioned, and plaintiff thereupon then and there received of and from defendant the said supposed indenture in the declaration mentioned, whereby the said supposed indenture was and is utterly void in law. The third plea varied from the second only, in describing the office as one "touching and concerning the receipt of his majesty's revenue." The fourth plea omitted all description of the office. Fifth plea, that before the making of the said indenture in the declaration mentioned, to wit, on, &c., at, &c., the plaintiff had been and was bag-bearer or bag-man in the pipe office in his majesty's court of Exchequer, and which said office of bag-bearer or bag-man then and there was a public office and employment, and the plaintiff then and there proposed to defendant that he would resign his said office, and procure defendant to be appointed to the said office on the terms in said indenture contained. And defendant further saith, that upon such resignation the privilege and right of appointing a succeeding bag-bearer or bag-man in lieu of the plaintiff, belonged to *James Farrer*, Esq., to wit, at, &c., and thereupon heretofore, to wit, on, &c., at, &c., it was without the privity, knowledge, or consent of the said *James Farrer*, corruptly, unlawfully and deceitfully, and contrary to the statute in such case made and provided, agreed between the plaintiff and defendant, that the plaintiff should relinquish

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linquish his said office in favor of defendant, and by recommending the defendant to the said *James Farrer*, as a fit and proper person to succeed him, the said plaintiff, in the same office, and by other subtle means and devices should cause and procure the said *James Farrer* to constitute and appoint the said defendant to be bag-bearer or bag-man in lieu or stead of the said plaintiff upon his resignation; and that, for such corrupt and unlawful considerations, and in order to secure to the plaintiff the moiety of the profits as in the indenture mentioned, he, the defendant, should make and seal, and as his act and deed, deliver the said indenture to and in favor of the plaintiff. And the defendant further saith, that afterwards, to wit, on, &c., at, &c., he, in pursuance of that unlawful agreement, did make and seal, and as his act and deed, deliver to and in favor of plaintiff, the said indenture in the declaration mentioned, whereby and on account whereof the said indenture was and is wholly void in law, &c. Sixth plea, that the indenture in the declaration mentioned was obtained and procured from the defendant by fraud, covin, and deceit of plaintiff. Replication, similiter to general issue. To the second plea, that the office of bag-bearer is not an office touching or concerning the administration of justice. To the third plea, that it is not an office touching or concerning the receipt of his majesty's revenue. To the fourth plea, protesting that the plea is bad, and that the indenture was made for a good and legal consideration, and not in pursuance of, or upon the supposed unlawful agreement in that plea mentioned, saith that the said place, situation, and office of bag-bearer or bag-man in the pipe office of his majesty's court of Exchequer in the fourth plea mentioned, before and at the time of making

making the said supposed agreement in that plea mentioned, and before and at the time of making the said indenture in the declaration mentioned, was and is an office in the gift of the person possessed of the office of first secondary in the pipe office in the said last mentioned court for the time being, by virtue of his said office, the said office of first secondary then and still being an office held under an appointment for the life of the person holding the same; and that before and at the time of the making the agreement in the fourth plea mentioned, and before and at the time of making the indenture in the declaration mentioned, one *James Farrer, Esq.*, was and still is a person possessed of the office of first secondary in the pipe office in the said last mentioned court under an appointment for his life; and that upon the resignation of plaintiff of the said place, situation, and office of bag-bearer or bag-man as in the fourth plea mentioned, the said situation and office of bag-bearer or bag-man was in the gift of said *James Farrer*, by virtue of his said office of first secondary so by him possessed as aforesaid, to wit, at, &c. And plaintiff further saith, that the said place, situation, and office of bag-bearer or bag-man was legally saleable before the passing of a certain act of parliament made and passed in the 49th year of the reign of his late majesty King *George* the Third, intituled "An act for the further prevention of the sale and brokerage of offices;" and that the said agreement in the fourth plea mentioned, if any such were made, was made by and with the full knowledge, privity, and consent of said *James Farrer*. To the fifth plea, that it was not without the privity, knowledge, or consent of *James Farrer*, corruptly, unlawfully, and deceitfully, and contrary to the statute, agreed

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agreed between plaintiff and defendant as in that plea alleged. To the sixth plea, that the indenture was obtained by the plaintiff from the defendant fairly and honestly, and not by the fraud, covin, or deceit of the plaintiff. Rejoinder took issue upon the replication to the second, third, fifth, and sixth pleas; and to the fourth said, that the agreement in the fourth plea mentioned was not made with the full knowledge, privity, and consent of the said *James Farrer*, but without his knowledge, privity, or consent. Issue thereon. At the trial before *Bayley J.*, at the second sittings for *Middlesex*, in *Easter* term, the first, second, third, and last issues were found for the plaintiff, the fourth and fifth for the defendant. No motion was made in the cause in *Easter* term, in consequence of some misunderstanding as to what took place at the trial, and upon application to the learned Judge, he being of opinion that the finding of the jury on the fourth and fifth issues was an answer to the action, gave the plaintiff leave to treat the case as if he had been nonsuited; and in pursuance of that permission

Denman now moved for a new trial. It was not incumbent on the plaintiff to communicate to Mr. *Farrer* the agreement entered into between himself and the defendant. No misrepresentation was made to Mr. *Farrer* as to the defendant's fitness for the office of bag-bearer. It was his voluntary act to appoint the defendant at the request of the plaintiff, and it seems difficult to understand how he can be affected by a private arrangement between those two persons.

ABBOTT

ABBOTT C. J. I am of opinion that we ought not to grant a rule in this case. Putting out of consideration all question as to the nature of the office, I think that the issues found for the defendant are an answer to the action, or rather that the plaintiff should have been nonsuited for want of proof that the bargain was made with the privity and consent of Mr. *Farrer*. The office was in the gift of that gentleman, and had he known that the effect of appointing the defendant would not be to give him the emoluments of the office, but to divide them between him and the plaintiff, it is probable that he might have exercised his right of patronage in a different mode; it appears to me, therefore, that this secret agreement was a fraud upon Mr. *Farrer*, and void in law.

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Denman then urged that the finding of the jury on the fourth and fifth issues was against the weight of evidence, and also produced affidavits to shew that the agreement was made known to Mr. *Farrer*, but the Court expressed themselves satisfied with the verdict on those issues.

Rule refused.

BAROUGH *against* WHITE.
 Tuesday
June 7th.

ASSUMPSIT by the plaintiff as indorsee of a promissory note made by the defendant for 300*l.* with interest payable to one *J. Arnitt*, or his order, on demand, the plaintiff having proved that he gave value for it, the defendant tendered evidence of declarations made by the payee when the note was in his possession, that he (the payee) gave no consideration for it to the maker: Held, that this evidence was inadmissible, as the plaintiff could not be identified with the payee, and the note could not be treated as over-due at the time of the indorsement.

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mand. At the trial before *Abbott* C. J. at the *London* sittings, after *Easter* term, the plaintiff proved the hand-writing of the drawer and indorser of the note, and also that he had bought and paid for goods for *Arnitt* to a considerable amount before the note was indorsed, but did not give any direct evidence of the consideration given by him for the note. For the defendant evidence was tendered of declarations made by *Arnitt* when he was the holder of the note, shewing that he gave no value for it to the maker; and the case of *Banks v. Colwell* (a) was relied on. The Lord Chief Justice rejected the evidence, because it could not be shewn that the plaintiff when he took the note knew that the payee gave no consideration for it. *Arnitt* was in court, but was not called as a witness. The plaintiff having obtained a verdict,

Cross Serjt. now moved for a rule nisi for a new trial. The declarations made by *Arnitt* at the time when he was the holder of the note ought to have been received in evidence. In *Pocock v. Billing* (b) *Best* C. J. says, "such declarations are admissions, and as such, receivable only when they are supposed to be adverse to the interest of the party." The declarations by *Arnitt* were clearly against his interest at the time when he made them, and were, therefore, admissible; besides, this plaintiff was in the same situation as the original payee, for a note payable on demand has been considered as a note over-due, *Banks v. Colwell*; and where a party takes a bill or note over-due, he takes it on the credit of the indorser, *Brown v. Davies*. (c) That being so, it was not

(a) Cited in *Brown v. Davis*, 3 T. R. 80.

(b) 2 Bingh. 269.

(c) 3 T. R. 80.

necessary,

necessary, in this case, to bring home to the plaintiff knowledge of the note having been given to the payee without consideration, he was liable to all objections which would have defeated an action by *Arnitt*.

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BAYLEY J. I am of opinion that the declarations made by *Arnitt* were not admissible in evidence. The defendant did not identify *Arnitt* with the plaintiff. Had it been shewn that the latter took the note without giving a consideration for it, or after it became due, the case would have been very different. Although there was no direct evidence of the consideration given by the plaintiff to *Arnitt*, yet dealings between them were proved, whence the existence of a valuable consideration might be fairly presumed. Neither does it appear to me that this note could be considered as over-due. It is said that in *Banks v. Colwell*, *Buller J.* treated a note payable on demand as a note taken by an indorsee after it was due; we are not, however, acquainted with all the circumstances of that case; payment might have been demanded before the indorsement, and indeed it is stated that several payments had been made on account. In this case no demand was proved, and the note being made payable *with interest to Arnitt or order*, makes it probable that the parties contemplated that the note would be negotiated for some time. For these reasons I think that the evidence was properly rejected, and that the verdict ought not to be disturbed.

HOLROYD J. I also am of opinion that the declarations were properly rejected. They could only be received as declarations against the interest of the party

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making them. But then the general rule is that the party, if living, must be called; *Arnitt* was still living at the time of the trial. Then was this note over-due at the time of the indorsement? I think that it cannot be so treated, for a note payable on demand is not open to the same suspicion as a note over-due, which is made payable at a particular time. The plaintiff, therefore, could not be put to the proof of the original consideration for the note.

LITTTLEDALE J. It is a general rule that where a person is living, and can be called as a witness, his declarations made at another time cannot be received in evidence. Thus, the declarations of a tenant at the time of his holding, or of a steward, cannot be admitted unless they are dead. To this there are some exceptions; for instance, where the party making the declarations can be identified with him against whom they are offered. That was not done in the present case. Neither do I think that the note was over-due, it seems to me that it was intended to be a continuing security, and that we could not treat it as over-due without evidence of payment having been demanded and refused.

ABBOTT C. J. The only point decided in *Pocock v. Billing* was, that in an action on a bill of exchange declarations of a prior holder could not be received, unless they were made when he had possession of the bill. That which fell from the Lord Chief Justice as to such declarations being admissions, and receivable when adverse to the interest of the party making them, was extrajudicial; and such observations are always to be taken rather as illustrations than as authorities in law, for we all

know that they are constantly made without the same consideration and care as those which belong to the point in judgment.

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Rule refused.

The KING against HOLLINGBERRY and Others.

Tuesday,
June 7th.

THE defendants were indicted for conspiring falsely to indict one *A. B.* for keeping a gaming house, for the purpose of extorting money from the said *A. B.* The jury found the defendants guilty of conspiring to indict *A. B.* for the purpose of extorting money, but not to indict him falsely.

Where several persons are convicted of a misdemeanor, a new trial cannot be moved for, unless they are all present in court; and it is not a sufficient excuse for absence, that they are in custody on civil process. Where an indictment charged the defendants with conspiring *falsely* to indict *A. B.* with intent to extort money, and the jury found them guilty of conspiring to indict with that intent, but not *falsely*: Held, that enough of the indictment was found to enable the Court to give judgment.

Denman was about to move on behalf of some of the defendants for a new trial, when it appeared that *Hollingberry* was not present in court, being in custody on civil process.

Per Curiam. That is not a sufficient reason for allowing the motion to be made in his absence. Had he been in custody on criminal process the case would have been different, for then he would have been charged with this matter also.

On the following day, all the defendants being in court, a rule for a new trial was moved for, on the ground that the verdict was against evidence, &c.

Chitty, on behalf of *Hollingberry*, moved in arrest of judgment, as the finding of the jury had negatived the

1825. charge as laid, viz., that the defendants conspired falsely to indict *A. B.*

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Per Curiam. In criminal cases it is sufficient for the prosecutor to prove so much of the charge as constitutes an offence punishable by law. This was an indictment for conspiring falsely to indict a person for the purpose of extorting money. The jury found the defendants guilty of conspiring to prefer an indictment for the purpose of extorting money, and that is a misdemeanor, whether the charge be or be not false.

Rule refused.

DOWN *against* HALLING and Others.

The owner of a check drawn upon a banker for 50*l.* having lost it by accident, it was tendered five days after the date to a shopkeeper in payment of goods purchased to the value of 6*l.* 10*s.* and he gave the purchaser the amount of the check after deducting the value of the goods purchased. The shopkeeper the next day presented the check at the bankers, and received the amount: Held, that in an action brought by the person who lost the check, against the shopkeeper to recover the value of the check, the jury were properly directed to find for the plaintiff if they thought the defendant had taken the check under circumstances which, ought to have excited the suspicion of a prudent man: Held, secondly, that the shopkeeper having taken the check five days after it was due, it was sufficient for the plaintiff to shew that he once had a property in it without shewing how he lost it.

ASSUMPSIT for money had and received. Plea, general issue. At the trial before *Abbott C. J.*, at the *London* sittings after last *Easter* term, the following appeared to be the facts of the case.

On the 16th of *November* 1824, the plaintiff's brother drew a check for 50*l.* upon Sir *Peter Pole, Thornton* and Co., and delivered it to the plaintiff. Between four and five o'clock on the evening of the 22d of *November*, a woman of respectable appearance came to the shop of the defendants, who were wholesale linen

drapers

drapers and haberdashers in *Cockspur Street*, and purchased a silk shawl and scarf, the price of which was 6*l.* 10*s.*, and she tendered in payment the check in question, dated on the 16th of *November*; upon being desired to write her name and address on it, she said she was an indifferent writer, and at her request the shopman wrote it for her. The defendants then gave her the amount of the check after deducting the price of the goods purchased. She carried the goods away with her. On the 23d of *November*, between nine and ten in the morning, the defendants presented the check for payment at the bankers and received the amount, and two days afterwards the plaintiff gave notice to the bankers not to pay it. Upon this evidence it was objected by the defendants' counsel, that the plaintiff ought to be nonsuited, because he had not given any evidence to shew how the check got out of his hands. The Lord Chief Justice overruled the objection, and directed the jury to find a verdict for the plaintiff if they thought that the defendants had taken the check under circumstances which ought to have excited the suspicion of a prudent man, observing at the same time, that there was no evidence to shew that the defendants, in taking the note, had acted fraudulently; but the question was, whether they had not acted negligently. The jury having found a verdict for the plaintiff,

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Denman on a former day in this term moved for a new trial upon two grounds. The plaintiff can only be entitled to recover the amount of this check, on the ground that the check was lost by theft or accident, or was obtained from him by fraud. Now, there

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was no evidence to shew the manner in which it passed out of the plaintiff's hands. It is consistent with the facts proved, that the woman who presented it for payment may have done so as the agent of the plaintiff. But assuming that the evidence in this respect was sufficient, the true question for the jury was not whether the defendants had acted with due caution, but whether they had acted *malâ fide*. It was admitted that there was no fraud, and that they had paid a full consideration for the check. The circumstance of the check being over-due five days, though calculated to excite suspicion, is immaterial, for it is not sufficient to warrant an imputation of *malâ fides* in the defendants. A party taking a bill, note, or check is not bound to take care of the interest of third persons : and if he takes it *bonâ fide* and for a valuable consideration, he is entitled to recover upon it, although he did not exercise due caution in ascertaining the interest of third persons. It is true, that the mode in which this case was presented to the jury, is warranted by the decision of this Court in *Gill v. Cubitt (a)*, but that is at variance with former decisions.

ABBOTT C. J. My Brothers are perfectly satisfied upon the latter point made in this case, but they entertain some doubts whether the plaintiff ought not to have given some evidence to shew how he lost the note ; and, therefore, as to that point, we will consider further, whether a rule ought to be granted.

(a) 3 B. & C. 466.

BAYLEY J. I think this case was left to the jury very favorably for the defendant. There is no question whatever in the case, if the distinction between bills overdue and not due be adverted to. If a bill, note, or check be taken after it is due, the party taking it can have no better title to it than the party from whom he takes it, and, therefore, cannot recover upon it if it turns out that it has been previously lost or stolen. Now, a check is intended for immediate payment, and not for circulation. It is the duty of the person who receives it to present it for payment on the same or the following day, and if he neglects to do so, and the parties upon whom it is drawn should become bankrupts in the meantime, he must bear the loss. Here the check was drawn on the 16th of *November*, it ought, therefore, in due course, to have been presented for payment on the 17th, and the defendant took it on the 22d. This is, therefore, just like the case of a bill taken after it is due, and the party taking it has no better title than the person from whom he took it, and cannot recover upon it.

HOLROYD J. This check must be considered in the same light as a bill taken after it is due. Now it has been frequently held, that a party taking such a bill, or note, takes it at his peril. In many of the cases where the title to stolen bills or notes has come in question, they have been taken before they were due, and then it may have been a proper question to submit to the jury, whether they were taken *malâ fide* or *bonâ fide*. A check is payable immediately, and the holder of it keeps it at his peril, and a person taking it after it is due, takes it also at his peril. Now, in this case, the check had been due five days at the time when

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it was taken by the defendants. That was a circumstance which ought to have excited their suspicion. I think, that when the defendants took the check, more than a reasonable time for presenting it for payment had elapsed, and therefore, they took it at their peril.

The case stood over until this day, when the opinion of the court on the other point was delivered by

ABBOTT C. J. We have considered the question, whether it were necessary for the plaintiff in this case to shew at what time and in what manner the check passed out of his hands. It was proved that the check was given to the plaintiff by his brother. By that delivery the property in it vested originally in the plaintiff. It further appears that the check came into the hands of the defendants five days after its date. We are of opinion, that an instrument of this nature coming to the hands of a party so long after its date is to be considered in the same light as a bill of exchange over-due; and in such a case it is incumbent on the party who takes the instrument under such circumstances, to shew that the party from whom he took it had a good title to it. That being so, it is not necessary in this particular case to lay down any general rule. At the same time I should feel great reluctance in laying down a general rule which would have the effect of requiring proof, which in many cases it might be impossible to give. Where a watch is stolen out of a private drawer, or a horse is stolen out of a field, it would be impossible for the owner to give evidence to shew how the theft was committed, and yet, if the argument urged on the present occasion were to prevail, in such cases it would be absolutely necessary for a party who brought his action to recover his own property,

property, to shew the mode by which it passed out of his hands. Without, however, laying down any general rule, we are of opinion that, in this case, the plaintiff having shewn the property in the check once to have been in him, it was incumbent on the defendants, who had taken it after it was due, to shew that the party from whom they took it had a good title to it.

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Rule refused.

NEAL *against* ISAACS.

ASSUMPSIT for goods sold and delivered. Plea, bankruptcy of the defendant. At the trial before *Littledale J.* at the *London* sittings after *Michaelmas* term 1824, it appeared that the plaintiff had, in *February* 1823, sold to the defendant goods to the amount of 119*l.*, and that in *April* in that year the defendant became bankrupt. But the future effects of any bankrupt who has been discharged under any act for the relief of insolvent debtors, being liable to his creditors under the 5 G. 2. c. 30. s. 9., the plaintiff, in order to prove that the defendant was discharged in the year 1815, under the insolvent act of the 53 G. 3., called, as a witness, the gaoler of *Lancaster Castle*, who produced the order of the Court for his discharge. That order recited, that upon hearing the petition of the prisoner, the Court had, amongst other things, ordered and adjudged the prisoner to be entitled to the benefit of the act; and it appearing to the Court that the prisoner having in all things conformed to the directions of the Court and the

act

An order made by the Court for the relief of insolvent debtors, and delivered to the gaoler in whose custody the prisoner was, is evidence of his discharge under statute 53 G. 3. c. 102. s. 10.

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act of parliament, the Court ordered him to be forthwith discharged from custody. It was objected by the defendant's counsel that this was not evidence of the order of the Court for the discharge, inasmuch as it was not the original order preserved in the court, nor an attested copy of it. *Littledale J.* inclined to think that an attested copy of the original order should be produced, and he nonsuited the plaintiff, but reserved liberty to move to enter a verdict for him. A rule nisi having been obtained for that purpose in last *Hilary* term,

Gurney now shewed cause. The warrant for the discharge of the prisoner, signed by the officer of the court, is not the judgment of the Court, nor does it purport to be a certified copy of such judgment. By statute 1 G. 4. c. 119. copies of the judgments, certified to be true copies by the officers in whose custody they are, are made evidence. Here the plaintiff has not produced in evidence either the original judgment or the certified copy.

Denman and *Abraham* contra. The order of the Court, directed to the gaoler of *Lancaster Castle*, to discharge the prisoner, must be taken to be the original order or judgment until it be shewn that there is some other. Here that was not shewn, and therefore this must be taken to be the original order of discharge.

ABBOTT C. J. In this case, the evidence of the discharge was offered against the party who was discharged under the act; in general it would be offered in his favor. But the act must be construed as if the discharge were set up by the defendant for his benefit.

The

The object of the act being to relieve the debtor, it must receive a liberal construction. This case arises under the 53 G. 3. c. 102., and we must consider whether there was sufficient evidence of a discharge under that act. Neither that nor any other act for the relief of insolvent debtors operates as a discharge of the debt, the future effects of the debtor remain liable. Under the later acts the party discharged is not liable to be sued for the debt, but a judgment is entered up against him in one of the superior courts, by virtue of which his subsequently acquired property may be seized. The statute 53 G. 3. was drawn, I will not say loosely, because I have learned from experience that it is difficult to provide for all cases that may arise, but I may say, that it is not drawn very accurately. We must examine the act to see what order the Court is to make. It certainly is not an order to discharge the debt, but only the person of the prisoner from custody. The thing required to be done is mentioned in section 10. That section enacts, "that in case the Court shall be of opinion that the prisoner is entitled to the benefit of the act, then it shall so order and adjudge, and shall in such order specify the several creditors and the persons against whose demands the prisoner shall be deemed by the Court entitled to be discharged;" and then, after directing several other things to be done, enacts that the Court shall appoint an assignee or assignees of the estate and effects of the prisoner for the purposes of that act, and shall order proper conveyances and assignments of such estate and effects to be made by the prisoner, according to the act, together with an engagement to be executed by him, to pay so much of the just debts and demands of the several persons against whom such prisoner shall by the Court

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Court be adjudged entitled to the benefit of the act, as shall not be paid out of his estate and effects to be conveyed and assigned by him for such purpose, in case he shall at any time thereafter be enabled to pay such debts and demands, or to pay such part or parts thereof as he shall be able at any time to pay. The act then enacts, "that upon the due execution of such conveyances, assignments, and engagements, &c., the Court shall order the prisoner to be discharged from custody." Now that is the only order for the discharge of the prisoner required under that act. Then, have the Court made such an order? The original order was produced. It recites, "that upon the hearing of the matter of the petition of the prisoner, the Court ordered and adjudged the prisoner entitled to the benefit of the act; and it appearing that the prisoner had in all things conformed to the directions of the Court and the act of parliament, the Court ordered the prisoner to be forthwith discharged from custody." Now this being the only order directed to be made, we must take it to be the order alluded to in the other parts of the act; and also the discharge mentioned in general terms in the 5 G. 2. c. 30. s. 9. This, therefore, was evidence sufficient within that act of parliament to deprive the party of the benefit of the certificate, although it is not a copy within the 1 G. 4. c. 119. Upon these grounds, I think the rule must be absolute to enter a verdict against the defendant, but it is not to operate against his person.

Rule absolute.

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HARTLEY *against* RICHARD JESSON CASE the Younger.

THIS was an action by the plaintiff as indorsee against the drawer of a bill of exchange bearing date the 13th of *April* 1824, payable four months after date, accepted by *Richard Jesson Case* the elder. At the trial before *Abbott C. J.* at the *London* sittings, after last *Michaelmas* term, the plaintiff, in order to prove notice of the dishonor of the bill to the defendant, gave in evidence the following letter from the plaintiff, dated the 16th of *August* 1824, the day on which the bill became due, addressed to the defendant, "I am desired to apply to you for the payment of the sum of 150*l.* due to myself on a draft drawn by *Mr. Case* on *Mr. Case*, which I hope you will on receipt discharge, to prevent the necessity of law proceedings, which otherwise will immediately take place." The Lord Chief Justice was of opinion that as this letter did not apprize the party of the fact of dishonor, but contained a mere demand of payment, it was not sufficient, and the plaintiff was nonsuited. A rule nisi for setting aside the nonsuit having been obtained in *Hilary* term.

A notice of the dishonor of a bill of exchange must contain an intimation that payment of the bill has been refused by the acceptor, and, therefore, a letter merely containing a demand of payment was held not to be a sufficient notice.

Brougham and *Manning* now shewed cause, and contended, first, that notice could not be given on the day when the bill became due, because the acceptor had the whole day to pay it in. And although in *Burbridge, v. Manners* (a) such notice was held to be good, yet in that

(a) 3 *Camp.* 193.

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case there had been an unqualified refusal to pay. Then this letter did not give to the defendant any notice that a bill drawn by him had been dishonored, it merely contains a demand of payment in respect of a bill drawn by a Mr. Case on a Mr. Case. In *Tindall v. Brown* (a) *Ashurst J.* lays it down "that notice means something more than knowledge, because it is competent to the holder to give credit to the maker. It is not enough to say, that the maker does not intend to pay, but that he the holder does not intend to give credit. In the present case there is no notice, for the party ought to know whether the holder intends to give credit to the maker, or whether he intends to resort to the indorser."

Scarlett, Holt, and Chitty contra. Notice of dishonor may be given on the day when the bill is dishonored. In *Leftley v. Mills* (b) *Buller J.* says, "a protest must be made on the last day of grace; now that supposes a default in payment, for a protest cannot exist unless default be made. But if the party has till the last moment of the day to pay the bill, the protest cannot be made on that day." Secondly, the letter clearly imports that the plaintiff demanded a sum due in respect of the bill in question; it describes the drawer and acceptor as having the same surname, the sum for which it is drawn to be the same, and it claims the amount as money due from the defendant to the plaintiff; now that could not be unless the bill had been dishonored by the acceptor.

ABBOTT C. J. There is no precise form of words necessary to be used in giving notice of the dishonor of a

(a) 1 T. R. 169. See also *Ex parte Moline*, 19 Ves. 216.

(b) 4 T. R. 174.

bill of exchange, but the language used must be such as to convey notice to the party what the bill is, and that payment of it has been refused by the acceptor. Here the letter in question did not convey to the defendant any such notice; it does not even say that the bill was ever accepted. We, therefore, think the notice was insufficient, and the rule for a new trial must be discharged.

Rule discharged.

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In the Matter of PETER TAYLOR, Gent.,
One, &c.

Wednesday,
June 19.

IN *Hilary* term 1822 *Taylor* had been struck off the roll of attorneys, on the ground that he had been improperly admitted, not having served as an articled clerk for the full term of five years. It then appeared that during the whole term of five years for which he was bound to serve as an articled clerk to *Richardson* and *Powell*, attorneys at *Knaresborough*, he had been surveyor of taxes for the wapentake of *Claro* and the borough of *Ripon, Yorkshire*, and the Court were of opinion that he could not, therefore, be considered to have served his whole time and term in the proper business of an attorney as required by the stat. 22 G. 2. c. 46. s. 8 & 10. (a) On the 11th of *April* 1822 he again articled himself for five years to Mr. *Conyers* an attorney at *Knaresborough*, and served him under such articles until the 25th of *March* 1824 when *Conyers* left *Knares-*

An articled clerk to an attorney held the office of surveyor of taxes during the term of his clerkship. But it appeared, upon affidavit, that for more than three of the five years for which he was bound, his service had been given to the attorney to whom he was articled. He afterwards bound himself to another solicitor, and served him for two years; it was held that his service under the first articles could not be coupled with

his service under the second.

(a) 5 B. & A. 538.

1825. *borough*, and *Taylor* was then assigned to one *S. Dickinson* whom he still continued to serve. In *Hilary* term 1825, having served nearly three years under the articles to *Conyers* and *Dickinson*, he gave the usual notice of his intention to apply to be admitted an attorney of this court. It was stated in an affidavit made by him on that occasion, that his office of surveyor of taxes frequently did not call for his attention beyond the occasional writing of a letter, for periods of two months together, and that upon the average of the year, for six entire days at the least out of eight, being equal to three years and three quarters of a year of the period of five years, the term of the original clerkship, he was exempted from any occupation in his office of surveyor of taxes, and was entirely at the command of the solicitors whom he then served, and that for full three years of his original clerkship he was in attendance and employed in their service. Mr. Justice *Bayley*, upon an affidavit of these facts, granted a fiat for his admission, and on the 30th of *April* 1825 he was again admitted an attorney of this court. A rule nisi had been obtained in *Easter* term for striking him off the roll, on the ground that the services under the different articles could not be coupled so as to make one entire term of five years, and that, upon the facts disclosed in the affidavits, he had not served two years in the whole under the first articles. Upon that point the affidavits were contradictory.

Scarlett and *T. Williams* now shewed cause. Assuming that *Taylor* had served as an articulated clerk for the term of five years altogether, it then becomes a question whether the services under the articles can be coupled together. The words of the stat. 22 G. 2. c. 46. s. 8. are, "that any person who shall become bound by contract in writing

writing to serve any attorney or solicitor, as by the said act is directed, shall during the whole time and term of service, to be specified in such contract, continue and be actually employed by such attorney or solicitor, or by his or their agent or agents, in the proper business, practice, or employment of an attorney or solicitor." It is true that the words are that he shall continue to be employed by such attorney, but the legislature cannot have intended that there should be one unbroken service to the same solicitor, for section 9. provides that, in case of the death of the solicitor, or his discontinuing practice, &c., service with another shall be sufficient. Then if the act is not to be construed literally, it must be construed with reference to the object which the statute had in view. That was that every person admitted an attorney should previously have acquired competent skill by a service of five years. Now here, assuming the facts stated in *Taylor's* affidavit to be true, there has been a service of five years, and the object of the legislature is therefore answered. In *Ex parte Rowle* (a) the party had served for five years, but during ten months of that period he served a solicitor to whom the articles had not been assigned, and the Court were of opinion that he must serve under articles for another period of ten months.

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Alderson contra. The statute requires the party to be and continue in the service of the master during the whole time and term. Now here *Taylor* having made a contract to serve government, which continued during the whole time he was bound under his first articles, was not capable of contracting to serve an attorney

(a) 2 Chitty, 61.

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during the whole time and term, but only during so much as government would allow. He could not possibly serve the attorney in the proper office and business of an attorney during the whole term, and he was not *sui juris* to enter into a contract so to do, *Rex v. The Inhabitants of Beaulieu*. (a)

ABBOTT C. J. This question arises on the construction of the 22 G. 2. c. 46. s. 8. The object of the legislature was that every person before he could be admitted should acquire competent skill and knowledge to conduct the business of an attorney; and to attain that object the legislature has expressly enacted that there shall be a service as a clerk under a contract to serve for five years. It has happened in some instances that the service has been put an end to before the five years have expired, and there has been a definite and precise interval, and afterwards an additional binding and service, and it has been then held that the deficiency might in that manner be supplied; but we are called upon to go further in this case, and to fill up an interval of days at least, if not of hours, and occurring at different times during which he was not employed in the service of an attorney, and which he was bound by a previous contract with government to give up to another office. If we were to do that I think we should not comply either with the spirit or with the words of the act of parliament. This may be a case of some hardship, but if we yielded to the argument in this particular case, we must insensibly, by degrees, do away with the general rule altogether. I am of opinion that the service required by the act of parliament must be a service to the

(a) 2 M. & S. 229.

master continuing during the time and term of years specified in the contract, and not a service broken by devoting days and hours to a different employment accepted by the clerk.

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BAYLEY J. When this case came before me at chambers, I thought that as the party had actually served for the period of five years required by the act of parliament, he ought to be admitted; but, upon further consideration, I think that as the party when he entered into the service of the attorney was not *sui juris* to contract, so as to give to the master a control over him during the whole time and term, the act has not been complied with, and consequently that this rule must be made absolute.

Rule absolute.

DARTNALL *against* HOWARD and Another.

Thursday,
June 16.

ASSUMPSIT for negligently laying out money on bad securities. The declaration stated, that whereas heretofore, to wit, on, &c., at, &c., in consideration that the plaintiff at the request of the defendants would retain and employ them the defendants to invest and lay out a sum of money in the purchase of an annuity, they undertook to do their duty in the premises; that plaintiff did retain and employ them, but defendants did not do their duty, but on the contrary, took an insufficient security for the payment of the annuity, whereby plaintiff lost the money: Held, on motion in arrest of judgment, that the count was bad, inasmuch as it did not state that any reward was to be paid to the defendants, or that they were employed in any particular character so as to make them responsible for taking a bad security, although not guilty of negligence or dishonesty.

Other counts alleged that the defendants, at the time when they lent the money, knew that the security was insufficient, but did not allege that the plaintiff had sustained any damage.

Sembla, That on that ground those counts also were bad.

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out a certain large sum of money, to wit, 1400*l.*, in the purchase of an annuity for and on behalf of the plaintiff, they, the defendants, undertook, and then and there faithfully promised the plaintiff *to perform and fulfil their duty in the premises*, and the said plaintiff avers that he confiding in the promise and undertaking of the defendants did afterwards, to wit, on, &c., at, &c., retain and employ the defendants for the purpose aforesaid. And the plaintiff saith, that although the defendants afterwards, to wit, &c., at, &c., did purchase a certain annuity, to wit, &c., of one *H. M. Goold*, for and on behalf of the plaintiff, payable to the plaintiff, his executors, administrators, and assigns, during the term of the natural life of the said *H. M. Goold*, yet the defendants not regarding their promise and undertaking so by them made as aforesaid, but contriving and, &c., did not, nor would perform or fulfil their duty in the premises, but then and there wholly neglected so to do, and on the contrary thereof they, the defendants, laid out the said sum of money in the purchase of an annuity of 216*l.* on the mere personal security of the said *H. M. Goold* and of one *E. B.*, commonly called Lord *Athenry*, for the payment of the said annuity, the said *H. M. Goold* and the said Lord *Athenry*, or either of them, not being then and there possessed of any property whatever available for the securing the payment of such annuity as aforesaid, the said *H. M. Goold* and Lord *Athenry* being at the time of granting such annuity as aforesaid in insolvent circumstances, of all which said several premises the said defendants then and there had notice, to wit, at, &c.

The second count, after the same inducement, stated that defendants took warrants of attorney from *H. M.*

Goold and Lord *Athenry* to secure the payment of the annuity, but that *H. M. Goold* at the time of granting the annuity was a prisoner for debt, and that he and Lord *Athenry* were then in insolvent circumstances, whereof the defendants then and there had notice. The third count, after a similar statement of the retainer and promise, alleged as a breach, that the defendants did not nor would perform or fulfil their duty in the premises last aforesaid, but on the contrary thereof, laid out the money upon security wholly insufficient and of no value whatsoever, by reason of which said several premises the plaintiff hath wholly lost the last mentioned sum of 1400*l.* and every part thereof, and the advantage, profit, and emolument which might and would have accrued to him if the said last mentioned sum of money had been laid out and invested in the purchase of an annuity upon good and valid security; and hath been, and is, thereby and by reason of the premises greatly injured and damnified, to wit, at, &c.

Plea, the general issue. At the trial before *Abbott* C. J. at the *Westminster* sittings, after last *Michaelmas* term, a verdict was found for the plaintiff, and in *Hilary* term the Attorney General obtained a rule nisi to arrest the judgment, on the ground that the declaration did not state that the defendants were to receive any reward for their services, or that they were employed in any particular character, and that, consequently, it did not appear on the face of the declaration that they had been guilty of any breach of duty.

Scarlett, *Tindal*, and *Abraham*, on a former day in this term, shewed cause. If the breach laid in this declaration had been merely for not laying out the money, the objec-

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tion taken to it might have been sufficient. But in one of the earliest cases upon this subject, *Coggs v. Barnard* (a), it was laid down, that when the declaration does not shew that any reward was to be given for the service, no action will lie for the mere omission to do it; but that if the party employed actually performs the service, but so negligently as to work a prejudice to his employer, then he is liable to an action for the misfeasance. This doctrine is illustrated by *Elsee v. Gatward*. (b) In that declaration there were two counts, alleging that the defendant was employed as a carpenter, the first count shewed a non-feasance, the second a misfeasance, and on demurrer the Court held the former bad, and the latter good. The first two counts of this declaration expressly aver that the defendants knew the parties to be insolvent at the time when they took their security, and taking such security under such circumstances certainly was gross negligence.

The *Attorney General* and *Chitty* contra. The declaration in this case alleges, that in consideration that the plaintiff would employ the defendants to lay out a sum of money in the purchase of an annuity, they undertook to perform *their duty in the premises*. It does not state that they were to have any reward for their services, nor does it state what their duty was, nor that they were employed in any particular character, so as to enable the Court to say what duty resulted from their professing to act in that character. *Bourne v. Diggle* (c) was a case somewhat similar to the present, it was an action against a person for laying out the plain-

(a) 2 *Ld. Raym.* 919.(b) 5 *T. R.* 145.(c) 2 *Chitty*, 311.

tiff's money on an annuity, and taking an insufficient security. The declaration did not state that the defendant was to have any reward, but it described him as an attorney, and alleged that he was retained to lay out the money, and the Court held that it was sufficient, the defendant being described as an attorney.

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ABBOTT C. J. There is another difficulty upon the plaintiff arising out of this declaration. The first two counts allege that the person to whom the money was lent, and who granted the annuity, was insolvent at the time of the loan, and that the defendants had notice of that fact; but they do not state that any damage has been sustained by the plaintiff. Now, although the grantor of the annuity was insolvent at the time of the grant, it is possible that he may since have acquired property and paid the annuity regularly. The third count does allege damage, but does not state that the defendants had notice of the grantor's insolvency.

Cwr. ad. vult.

The judgment of the Court was now delivered by

ABBOTT C. J. This was a motion in arrest of judgment. The declaration contained three special counts, and if any one count is bad the judgment must be arrested. The third count is, that in consideration that the plaintiff would retain and employ the defendants in laying out and investing a sum of money in the purchase of an annuity for the plaintiff, that the defendants undertook and promised to perform and fulfil their duty in the premises; and it avers, that the plaintiff, confiding in those promises, did employ and retain them for the purpose aforesaid, but that they not regarding their promises,
but

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but intending to injure him, did not, nor would perform or fulfil their duty in the premises, but, on the contrary, laid out the same on a security wholly insufficient, and of no value whatever. In this count the defendants are not alleged to be attornies, and, therefore, any duty that would arise from that character cannot be attributed to or imposed on them under the present declaration. The word *retained* by no means imports that they were attornies, because it is applicable to any person who is engaged by any other person as his master or as his employer, and, therefore, the utmost this count amounts to is a promise on the part of the defendants to fulfil their duty; and it is alleged as a part of their conduct that they took a security insufficient, and of no value whatever. Can we say that it is the absolute duty of any person so employed, without pay, and without remuneration, can we, under those circumstances, say that it is his absolute duty not to take a security of an insufficient nature? If we can say that it is, then inasmuch as this count charges him with a breach of that duty, it is a good count; if we cannot say that, then it is not a good count. I am of opinion that the count is bad. The only duty that is imposed under such a retainer and employment as is here mentioned is a duty to act faithfully and honestly, and not to be guilty of any gross or corrupt neglect in the discharge of that which he undertakes to do. But a man may, when acting most faithfully and most honestly, happen to take an insufficient security, without gross or culpable negligence on his part, he may have been misled, he may have been deceived, he may have taken such care as an ordinary man would take with regard to the subject matter intrusted to him, and yet doing all that,
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his endeavours may have failed, and it may so happen the security may without his knowledge and against his will have turned out to be insufficient. For these reasons it appears to the Court that this count is not sustainable, and, consequently, the rule for arresting the judgment must be made absolute.

Rule absolute.

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The KING *against* M'KAR.

Thursday,
June 16.

INFORMATION in the nature of a quo warranto, stated that the borough of *Stockbridge*, in the county of *Southampton*, is an ancient borough; and that two burgesses now are, and for ten years and upwards, have been elected and sent, and of right ought to be elected and sent, to serve as burgesses of and for the said borough in the commons in the parliament of this kingdom; and that for and during all that time there hath been, and still of right ought to be, within the borough as appertaining to the same, one bailiff of the borough; and that the office of bailiff of the said borough now is, and for and during all the time last aforesaid, hath been "*an office of great trust and pre-eminence within the said borough, touching the rule and government of the borough, and the election and return of burgesses to serve for the commons in parliament for the said*"

Quo warranto for usurping the office of bailiff of the borough of *Stockbridge*, being an office "of great trust and pre-eminence within the borough, touching the rule and government of the borough, and the election and return of burgesses to serve for the commons in parliament for the said borough." The defendant's pleas shewed that he had been elected to the office, and traversed, "that the office of bailiff was an office touching the rule and government of the borough." There were general replications, taking issue upon all the facts stated as inducement to the defendant's traverse, (but they did not notice the traverse,) and special replications setting up various customs as to the election of bailiffs of the borough. Demurrer and joinder: Held, that the defendant, not having traversed that the office "was one of great trust and pre-eminence within the borough touching the election and return of burgesses to serve in parliament," had admitted it to be so, and that for such an office a quo warranto would lie; and, secondly, that the general replications being clearly good, and the demurrer being to all the replications, judgment must be given for the crown.

Quære, Whether the special replications were good?

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borough ;” and that *James M'Kay*, on, &c., at, &c. did, use and exercise, and thence continually hath used and exercised, without any legal warrant, royal grant or right whatsoever, the office of bailiff of the said borough, &c. in the the usual form. Plea, first, that *J. F. Barham*, Esq., on, &c., was seised in fee of the borough and manor of *Stockbridge*, and was lord of the said borough and manor, and of the court leet holden in and for the same ; and that the said *J. F. Barham*, and those whose estate he hath, from time whereof, &c., have of right had and held, and still of right ought to have and hold, on *Wednesday* next after the feast of *Easter* in every year, a court leet, in and for the borough and manor of all the inhabitants within the borough and manor, before the steward of the borough and manor, or his deputy ; and that the lord of the borough and manor for the time being, during all the time last aforesaid, has had, and of right ought to have had, and the said *J. F. Barham* of right ought to have a bailiff of the said borough and manor for the receiving of the rents, reliefs, amerciaments, and perquisites of courts of the lord of the said borough and manor, and to do all other things belonging to the said office of bailiff ; which said bailiff, during all the time last aforesaid, hath been, and of right ought to have been, and still of right ought to be, appointed yearly and every year at the court leet, by the steward of the said court or his deputy, on behalf of the lord. The plea then averred the holding of a leet, on, &c., and his appointment by the deputy steward, whereupon he took upon himself the office of bailiff of the borough for the year next ensuing, “ without this, that the said office of bailiff in the said information above mentioned, is an office touching the rule and government of the said borough,

borough, and without this, that the said *J. M'Kay*, the said office, liberties, and franchises in the information mentioned, did usurp upon our lord the king," &c. There were several other pleas varying in the statement of the mode in which the defendant was appointed, but all concluding with the same traverse. To these pleas there were sixteen general replications, putting in issue the several facts stated as inducement to the defendant's traverse, and amongst others, the lord's right to have a bailiff for the receiving the rents, reliefs, &c. as stated in the pleas, and thirty special replications setting up various customs as to the election or appointment of the bailiff of the borough, but none of the replications took any notice of the defendant's traverse. Demurrer to all the replications, assigning for causes, "that it does not appear, nor is it shewn in or by any or either of the said pleas above pleaded in reply, that the said office of bailiff of the said borough and manor is a *public office touching or concerning the government of the said borough*, or any office for the use and exercise of which our said lord the king will or ought to sue, harrass, or vex the said *J. M'Kay*; but on the contrary thereof, it appears by the several pleas pleaded by the said *J. M'Kay*, and by the several pleas in reply, that the said office is a private office of the lord for the receiving of the rents, reliefs, amerciaments, and perquisites of courts of the said lord of the borough and manor, and not an office touching the rule and government of the said borough. Joinder in demurrer.

Merewether in support of the demurrer. The information describes the office in question, as one "of great trust and pre-eminence within the borough, touching

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ing the rule and government of the borough, and the election and return of burgesses to serve for the commons in parliament for the borough." The defendant in his plea traverses, that the office is one "touching the rule and government of the borough," and that traverse is not disputed by the replications. The office must now therefore be considered merely as "touching the election and return of burgesses to parliament;" and the real question is, whether a quo warranto lies for such an office. The bailiff is not described as the "returning officer." That term is well known to the law, and if it had been intended to allege that the bailiff of *Stockbridge* is the returning officer, that description should have been adopted. Poll-clerks are officers "touching the election and return" of members of parliament, the undersheriff also in a county is an officer of that description, the information, therefore, does not import that the defendant was returning officer. In *Rex v. Mein* (a), he was expressly stated to be so, which makes that case perfectly distinguishable from the present. In *Rex v. Bingham* (b), an information in the nature of a quo warranto was granted against the bailiff of a court leet, but the ground of Lord *Ellenborough's* judgment was, that the bailiff had the power of selecting the jury to serve at the court leet. It is not stated that this defendant enjoys any such authority.

Carter contra. The defendant in his plea traverses a part of the description of the office given in the information, and also traverses the usurpation. Now a traverse of the usurpation is only allowable after shewing a

(a) 3 T. R. 596.

(b) 2 East, 308.

title. The plea, therefore, begins by stating a title, viz. that the lord hath a right to have a bailiff for certain purposes, and that the defendant was under that right appointed bailiff. In the general replications that right of the lord is denied. Now, if the defendant's traverse results from the facts stated in his plea, the prosecutor was right in denying those facts instead of the traverse. [*Littledale J.* In the special replications you state various modes in which the bailiff ought to be elected; ought you not, instead of that, to have traversed the mode of appointment stated in the pleas?] Even if that be so, the observation does not apply to the general replications, and the demurrer is to them all; if, therefore, any one be good, the crown is entitled to judgment. Supposing the traverse of the nature of the office, as stated in the plea, to be admitted by the replications, still enough remains to shew that it is an office for which a quo warranto lies, for the defendant does not deny that it is "an office of trust and pre-eminence touching the election and return of members of parliament." Now, in the case of the borough of *Horsham* (a) a quo warranto information was granted against a person claiming to have a right of voting by virtue of a burgage tenement; that only touched the election, and not the return of members; this case is, therefore, stronger in favour of the crown.

BAYLEY J. (b) I am of opinion that the office described in the information, qualified as it is by the plea, is still an office for which a quo warranto lies. The information states that *Stockbridge* is an ancient borough,

(a) 3 T. R. 599. n.

(b) *Abbott C. J.* left the court during the argument.

sending

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sending two members to parliament, and that there has been and ought to be, as appertaining to the borough, one bailiff, and that the office of bailiff is one of great trust and preeminence within the borough, touching the rule and government of the borough, and touching the election and return of members of parliament for the borough. The defendant pleads specially several facts, shewing his title by way of inducement, and concludes with a formal traverse, that he has not usurped, and with that which he intends for a material traverse of the description of the office. That traverse limited the extent of the defendant's plea, which was therefore an answer to that point only of the information specified in the traverse. The inducement to the traverse could not be taken as an answer to the residue of the information, and, therefore, no pleading thereon could affect the question as to the residue, viz., the office qualified as it was by the traverse. That residue stood unanswered. To have answered it there should have been a distinct plea. The defendant's traverse then, in effect, takes out of the information all that is traversed, viz., that the office touches the rule and government of the borough. That still admits it to be "an office of trust and preeminence, touching the election and return of members of parliament," and fairly raises the argument used, that such an office, without the other ingredient, is not the subject of a quo warranto information. It is not usual in informations of that nature to shew what are the particular duties of the office, but to shew sufficient to make it appear to be a franchise granted by the crown. Now all officers of a borough are originally created by a charter. Is not this, then, a privilege or franchise? In *Rez. v. Mein* the defendant was an officer of a borough,

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viz. a port-reeve, and Lord *Kenyon* said, that the port-reeve was ex vi termini a public peace officer ; he did not however decide the case upon that ground, but on the ground of his being a returning officer he held that the information would lie. Then the *Horsham* case, which has been quoted, was much stronger than the present. It has been said that this defendant is not stated to be a returning officer, but I cannot understand how any one in his capacity of officer of the borough can be an officer touching the election and return of members, except the returning officer. For these reasons I think that our judgment must be for the crown.

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HOLROYD J. The crown is entitled to judgment at all events with regard to the general replications. It seems to me that the plea of the defendant was intended to embrace more than it ought. It endeavours to set up two grounds of defence, first, that the defendant was duly elected or appointed ; and, secondly, that he was not a public officer. If the traverse had gone to the whole of the description in the information, either of those would have been a good defence, the plea, therefore, would have been bad on demurrer. But the plea does not deny that the office is touching the election and return of members of parliament, that, therefore, is admitted, and I think it is a sufficient description of an office for which a quo warranto lies. Then the crown having a right to traverse the facts stated as inducement to the defendant's traverse, our judgment must equally be for the crown, whether the special replications are good or bad.

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LITLEDALE J. The crown has a right to deny and put in issue every part of the defendant's plea; and if any issue in law or fact is found for the crown, it is entitled to judgment. Now the defendant has demurred to all the replications, general as well as special. Admitting the plea to be good, still, the demurrer to the general replications cannot be so. But then it is said that the defendant has traversed the nature of the office, the traverse, however, only goes to a part of the description, and therefore admits the rest, and that which is unanswered shews it to be an office for which a quo warranto lies. With respect to the special replications I am disposed to think them bad. If the plea is good on the face of it, the crown should confess and avoid, or deny it, instead of that the special replications set up another mode of electing the bailiff; that sort of pleading might be continued ad infinitum. Upon the whole of the pleadings, however, our judgment must be for the crown.

Judgment for the crown.

Friday,
June 17th.

Bosc *against* SOLLIERS.

By the jurat to an affidavit of debt made by a foreigner, it was certified by the signer of the bills of Middlesex that the affidavit was interpreted

by J. C., professor of languages, (he having first sworn that he understood the English and French languages,) to the deponent, who was afterwards sworn to the truth thereof: this was held to be sufficient.

A RULE nisi had been obtained, calling upon the plaintiff to shew cause why the bail-bond should not be delivered up to be cancelled on the defendant's filing common bail. The affidavit of debt purported to be signed by the plaintiff; and there was the following

memo-

memorandum annexed to it: "This affidavit was interpreted by *Francis Chauvet*, of, &c., in the county of *Middlesex*, professor of languages, (he having first sworn that he understood the *English* and *French* languages,) to the deponent, who was afterwards sworn to the truth thereof, at, &c., in the said county, before me, *E. J. Boddy*, deputy-signer of the bills of *Middlesex*." The rule was obtained on the ground that it did not appear in the jurat either that the person who made the affidavit of debt understood either the *French* or *English* language, or that the interpreter was sworn duly to interpret the oath and affidavit. It now appeared by an affidavit of *Boddy*, produced by the plaintiff, that the jurat was written by him as had been usual and customary on all such occasions, for a period of eight years, during which he had been in the office, and in the constant habit of taking such affidavits.

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E. Lowes now shewed cause. This jurat is in the form commonly used on such occasions. In the case of a marksman, the commissioner taking the affidavit, or signing the jurat, certifies that it was read in his presence to the party making the same, who seemed perfectly to understand it, and made his mark in the presence of the commissioner. In that case, therefore, the Court is satisfied by the certificate of the commissioner, that the party understood the matters of the affidavit. So here the Court ought to be satisfied by the certificate of the signer of the bills of *Middlesex*, that the party was duly sworn to the contents of the affidavit.

Campbell contra. It lies upon the plaintiff to produce to the Court an affidavit disclosing such circumstances

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as shew that the defendant was duly held to bail. It must appear, therefore, that the plaintiff has sworn to the matters contained in the affidavit. Now giving full credit to all the facts stated in the jurat, that does not appear. It appears that the plaintiff was a foreigner, and it ought therefore to be shewn that the oath and the matters of the affidavit were duly interpreted to her. It does not appear that the plaintiff either understood the *French* language, or that the interpreter was sworn to interpret the affidavit to her.

ABBOTT C. J. This jurat is in the common form used in all similar cases, and I think it contains sufficient matter from which the Court may reasonably infer that this affidavit has been duly sworn. It alleges that the affidavit was interpreted to the deponent. Now, that could not be unless the interpreter and the deponent understood one and the same language. If the certificate were defective in this respect, I think such defect might be supplied; but I think we are bound to trust the officer of the court, and to suppose that he exercises a sound discretion in the discharge of his duty; when, therefore, he certifies to us that the affidavit was interpreted by a person who swore that he understood the *French* and *English* languages, and that the deponent swore to the truth thereof, we must intend that the person making the affidavit understood the same language as the interpreter; and that the latter was sworn well and truly to interpret the oath and the matters of the affidavit. This rule must therefore be discharged.

Rule discharged.

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The KING *against* the Trustees of the BURY and
' STRATTON Roads. Friday,
June 17th.

D. *F. JONES* had obtained a rule last term, calling upon the trustees under an act passed in the 59 G. 3., entitled "An act for repairing the road from *Shelton's Lane*, in *Bury*, in the county of *Huntingdon*, to a house formerly called the *Spread Eagle*, in the hamlet of *Stratton*, in the parish of *Biggleswade*, in the county of *Bedford*," to shew cause why a writ of mandamus should not issue directed to them, commanding them to call a meeting for the purpose of establishing an uniform rate of tolls to be taken at all the different toll bars, toll gates, and toll houses on the line of the said road, and to do all acts necessary to be done by them, or any of them, for the due calling of such meeting. The question in this case depended on two sections in the act of parliament, the first imposing the tolls, and the second authorising their reduction. By the former section, the trustees were authorised to demand and take at each and every of the several and respective turnpikes or toll gates, standing and being erected by virtue of that act upon the side of the said road, "For every horse, mule, ass, or other cattle drawing any carriage, &c. the sum of 9*d.*: for every horse, mule, or ass, laden or not laden, and not drawing, the sum of 2*d.*: for every drove of oxen, cows, calves, or other neat

By a turnpike act, the trustees were authorised to take at each and every of the several and respective turnpike gates erected on the road the following tolls: "For every horse, mule, or other cattle drawing a carriage, ninepence: for every horse, mule, or ass not drawing, twopence: for every drove of oxen, cows, &c., one-shilling and sixpence per score: for every drove of hogs, sheep, &c., one-shilling and fourpence per score." By another section, it was made lawful for the trustees, at a meeting to be holden for that purpose, whereof notice in writing was to be affixed on all the turnpike gates erected on the road, to lessen and reduce, and again to raise and advance all or any of the tolls thereby granted, and such tolls so reduced or advanced were to be collected as the tolls thereby granted: Held, that under this act, the trustees were authorised to reduce or advance any one of the four descriptions of tolls at all the gates, but not to reduce or advance them at one gate and not at another.

1825. cattle, the sum of 1s. 6d. per score: for every drove of hogs, swine, goats, sheep, or lambs, the sum of 1s. 4d. per score." By the latter section it was made lawful for "the trustees at a meeting to be holden for that purpose, whereof at least twenty-one days' notice should be given in writing, to be affixed on all the turnpikes or toll gates erected on the said road, and published in some public newspaper circulated in the neighbourhood thereof, from time to time as they should think proper, to lessen or reduce, and again to raise and advance, all or any of the tolls thereby granted, so that the respective tolls so to be raised or advanced did not exceed the tolls by that act authorised to be taken; and so, as such reduction should be made with the consent in writing of the several persons who should be entitled to five-sixth parts of the money then due on the credit of the said tolls; and such tolls, so reduced or advanced, and every of them, should be collected, recovered, and applied as the tolls thereby granted and authorised to be taken were directed to be collected, recovered, and applied."

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Scarlett and *Chitty* now shewed cause. The power to reduce all or any of the tolls is not to be confined to an equal reduction of the tolls at all the gates, but includes a power to reduce the tolls at all or any of the gates. A discretion was intended to be vested in the trustees; the exercise of which discretion depends upon local circumstances, such as the different degrees of traffic on different parts of this long line of road, the nearness or distance of materials, the proximity of market towns, and other considerations. The trustees are not limited as to the number of gates, so that the object

of this application might be defeated by the erection of additional gates.

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The *Attorney-General* and *D. F. Jones* in support of the rule. The tolls originally granted are expressly directed to be taken and collected at each and every of the several toll bars. The reduced tolls are expressly directed to be collected in the same way as the tolls first imposed, which must mean *at each and every gate*. The power to reduce all or any of the tolls was obviously intended to mean all or any of the different tolls upon horses, sheep, cattle, &c. ; and the object of the act in authorising only a rateable deduction at each and every of the gates was to prevent any favor or partiality by the commissioners in respect of their own interests, or the convenience of their neighbours. They were then stopped by the Court.

BAYLEY J. It seems to me to be quite clear, advert-
ing to the act of parliament, that the power to reduce
the tolls is only to reduce them at all the different gates.
The act imposes four descriptions of tolls to be taken at
each and every of the several and respective turnpike
or toll gates. The first upon every horse, mule, or ass
drawing any description of carriage ; the second upon
the same class of animals not drawing ; the third upon
every drove of oxen, cows, calves, &c. ; the fourth upon
every drove of hogs, swine, &c. It is clear, therefore,
that in the first instance there was to be one uniform rate
of tolls at all the gates. That must have been the un-
derstanding of the inhabitants near the road at the time
when they consented to have the turnpike gates erected.
Then there is a provision for reducing and advancing

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all or any of the tolls, and that provides that notice of the meeting of the trustees to be convened for that purpose shall be affixed on all the toll gates, and that the tolls so reduced or advanced are to be collected as the tolls thereby granted. Now I think, that as the notice is to be fixed upon *all* the gates, and as the toll granted by the act of parliament was one uniform toll to be collected at *all* the gates, the legislature must have intended to give the trustees power to reduce or advance all the tolls, or any one of the four descriptions of tolls which they are authorised by the former clause to take at *all* the gates, but that they did not intend to give them power to reduce or advance the tolls at one gate and not at another. I think if they had intended to give the trustees such a power, they would have introduced an express clause into the act of parliament for that purpose. The rule, therefore, must be made absolute.

HOLROYD and LITLEDALÉ Js. concurred.

Rule absolute.

Friday,
June 17th.

SMITH against WATTLEWORTH.

An attorney of the superior courts cannot maintain an action for his bill for business done in the insolvent court in procuring the discharge of an insolvent, without first delivering a bill as required by the 2 G. 2. c. 23. s. 23.

ASSUMPSIT by the plaintiff, an attorney of the Court of K. B., for business done in the insolvent debtor's court in procuring the discharge of the defendant. Plea, the general issue. At the trial before *Abbott* C. J. at the *London* sittings after *Hilary* term, it was proved that the business had been done, but the plaintiff had not delivered his bill, pursuant to the 2 G. 2. c. 23., a month before the commencement of the action, and it was objected that the neglect so to do was an answer to the action. It appeared also that there is a tax-master

in

in the insolvent court. The Lord Chief Justice thought, the objection fatal, and directed a nonsuit, but gave the plaintiff leave to move to enter a verdict for the amount of his bill. A rule for that purpose was obtained in *Easter* term, against which

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Denman now shewed cause. The statute of the 2 G. 2. c. 23. s. 23. was intended as a protection to the subject, and on that account has always been liberally construed. The words of that section are, "that no attorney or solicitor of any of the Courts aforesaid (which refers to the Courts mentioned in the 1st section amongst which the Court of King's Bench is included) shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements at law or in equity, until the expiration of one month or more after such attorney or solicitor, respectively, shall have delivered unto the party to be charged therewith, &c. a bill of such fees, charges, and disbursements, &c., subscribed with the proper hand of such attorney." It has certainly been held, that a bill consisting entirely of charges for conveyancing was not within the statute; but the Courts have been careful not to extend the exception, and have decided that bills for business done at the Quarter Sessions must be delivered in the mode prescribed by the act, *Ex parte Williams* (a), *Clarke v. Donovan*. (b) The business of the insolvent court is surely as much business at law as the business at the sessions.

F. Pollock contra. The present insolvent court was created by the 1 G. 4. c. 119. and the 31st section en-

(a) 4 T. R. 496.

(b) 5 T. R. 694.

acted,

1825. acted, "that the said Court, to be established by virtue
 ——— of that act, should and might admit at their discretion
 SMITH any number of fit persons to practise in the said Court
 against as attornies or agents, on behalf of prisoners in actual
 WATTEWORTH. custody." The commissioners are not bound to admit
 only attornies of some other Court to practise before
 them ; and in case other persons are admitted, no other
 Court can exercise any control over their bills. Now it
 seems rather hard that an attorney of this Court should,
 in this respect, be in a worse situation than other per-
 sons. Besides under the power given by the 1st section
 of the 1 G. 4. c. 119. to appoint such officers as the Lord
 Chancellor, and the Lord Chief Justices of K. B. and
 C. P., and the Lord Chief Baron of the Exchequer,
 should judge necessary, the Court have appointed a
 tax-master, whose duty it is to tax the bills for all
 business done in that Court. Secondly, the obtaining
 the discharge of an insolvent is not business done either
 at law or in equity. It is a proceeding under a par-
 ticular act of parliament, creating a tribunal of limited
 and temporary jurisdiction, and the Court thereby con-
 stituted is made a court of record merely for the pur-
 poses of the act, and not generally.

ABBOTT C. J. I am of opinion that a bill signed as
 required by the 2 G. 2. c. 23. s. 23. should have been
 delivered one mqnth at least before the commencement
 of this action. The first question is, was the business
 done at law ? I am of opinion that it was, being done to
 obtain the discharge of a party arrested by process of
 a court of law. One argument urged for the plaintiff
 for some sime produced a considerable effect upon me,
 viz. that the insolvent court can admit persons to prac-
 tise

tise there who are not attornies of this or any other court, and that consequently their bills would not be taxable or within the provisions of the 2 G.2. c. 23. But many things may be done in other courts, as for instance in the Court of Quarter Sessions, by persons who are not attornies, and no court could tax the bills of such persons. But when the same business has been done by attornies of this Court, it has been held otherwise. That argument, therefore, is by no means conclusive; and as this plaintiff, an attorney of this Court, has done business which I consider business at law, it appears to me that he in like manner is subject to the provisions of the statute. It is said, that the tax-master appointed by the insolvent court is the proper person to tax such bills. Admitting that he has power to do so, (which, however, I do not decide,) still that would not be such a taxation as could take the case out of the former act, which is extremely beneficial to the subject. This rule must therefore be discharged.

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The other Judges concurring,

Rule discharged. (a)

(a) See Anon. case, 1 Doug. 199. (1). *Dixon v. Plant*, ib. *Ex parte Bearcroft*, ib. *Winter v. Payne*, 6 T. R. 645. *Hill v. Humphreys*, 2 B. & F. 343. *Ex parte Prickett*, 1 N. R. 266. *Sandon v. Bourn*, 4 Campb. 66. *Mowbray v. Flemming*, 11 East, 285. *Collins v. Nicholson*, 2 Taunt. 321.

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Saturday,
June 18th.

THE KING *against* HUGHES.

Information in the nature of a quo warranto for usurping the office of Mayor of Monmouth. Plea that defendant was duly elected according to the governing charter of the borough. Replication that there were two candidates; that 50 good votes, tendered for the losing candidate, were improperly rejected; and that 38 persons, who had been unduly elected, and admitted as burgesses, were received as voters for the defendant, and that a majority of the legal votes tendered was in favor of the other candidate. On demurrer, held that the replication was bad, for that it was only an argumentative and not a direct denial of the validity of the defendant's election, and also for that it attempted to put in issue the title of the electors (corporators de facto), which cannot be done in an information against the elected.

INFORMATION in the nature of a quo warranto, against the defendant for usurping the office of mayor of the town and borough of *Monmouth*. The defendant's plea set out a charter granted to the town and borough of *Monmouth*, by *Ed. 6.* in the 3d year of his reign, averred acceptance, and that it was still the governing charter of the borough; and that defendant was elected and sworn mayor according to the directions of the charter. There were two other pleas similar in substance, and a fourth plea setting out a non-existing bye-law made to regulate the election of mayor, and that the defendant was elected according to that bye-law. To these pleas there were 31 general replications, taking issue upon the various facts alleged in the pleas. Then followed a special replication, that at the said meeting of the said burgesses, of the said town and borough held on, &c., for the choosing of a mayor of the said town and borough, as in the 1st plea mentioned, two several candidates were duly nominated and proposed for the office of mayor of the said town and borough, to wit, one *Robert Bevan*, then and there being a burgess of the said town and borough, and being then and there a fit and proper person to be such mayor, and the said *Henry Hughes*; and that afterwards, and after such nomination and proposing of the said *Robert Bevan*, and of

the said *Henry Hughes*, to wit, on, &c., at, &c., a poll of the votes for the said respective candidates was then and there demanded, and was then and there granted by *T. G. Phillpotts*, acting as mayor of the said town and borough, and presiding at the said meeting- And the said coroner further saith, that divers of the burgesses of the said town and borough, to wit, (here 50 burgesses were named,) having a right to vote in the said election of mayor of the said town and borough, attended and were present at the said last-mentioned meeting, as such burgesses as aforesaid, and then and there tendered and offered their votes respectively for *Bevan*, to be such mayor of the said town and borough, to *Phillpotts*, then and there acting as mayor of the said town and borough, and the presiding officer of such meeting. And the said coroner further saith, that the said (fifty persons) so offering and tendering their votes for *Bevan* were rejected by *Phillpotts*, and were not reckoned as voters, and that divers, to wit, (here thirty-eight other persons were named,) of the said supposed burgesses in the first plea stated to have been met and assembled together, and to have chosen the said *Hughes* to be mayor as aforesaid, had been theretofore, to wit, *A. B. &c.* on the 17th day of *July* 1820, *C. D. &c.* on the 20th day of *July* 1820, *E. F. &c.* on the 4th day of *Dec.* 1820, *G. H., &c.* on the 18th day of *June* 1821, and *I. K. &c.* on the 10th day of *Feb.* 1823, respectively, illegally chosen to be burgesses at certain pretended corporate meetings of the said burgesses, on those respective days, and had under and by color of the said illegal elections, and with no other right or title been severally admitted as burgesses of the said town and borough, and that the said (thirty-eight

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eight persons) then and there not being legal burgesses of the said town and borough, and then and there having no legal right to vote as burgesses at the said election of mayor, tendered their votes for *Hughes*, were objected to by *J. P.* a burgess, as persons having been improperly and illegally admitted burgesses of the said town and borough, and as having no legal right to vote as last aforesaid, and were, notwithstanding such objections, severally and respectively admitted by *Phillipotts*, then presiding as mayor, to give their votes for and on behalf of *Hughes*, and did give their votes for and on behalf of *Hughes*, and the same were then and there received and reckoned as votes for *Hughes*. And the said coroner further saith, that the major part of the burgesses so met and assembled and present at the said last-mentioned meeting, who had a right to vote, and ought to have been admitted and received as legal voters at such election respectively, voted and tendered their votes for *Bevan* to be such mayor as last aforesaid; and *Bevan* had then and there a majority of legal votes in his favor to be such mayor as last aforesaid, and then and there ought to have been declared and sworn in as such mayor; and this the said coroner is ready to verify, &c. There were other replications similar in substance. The defendant joined issue upon the general replications, and demurred to the others, assigning as causes of demurrer, "that the same several replications do not directly deny or traverse any of the matters contained in the same several respective pleas of the said *H. Hughes*, nor confess and avoid the same; and also for that the same several respective replications do not directly

directly answer the same several respective pleas, or any of them, but respectively are, at most, argumentative answers thereto; and also for that the same several respective replications are multifarious and double; and also for that the said several respective replications do not contain any matter upon which pertinent and conclusive issues can be taken; and also for that the same several respective replications contain matter of evidence, and not of allegation, and that all the matters contained in the said several respective replications might be given in evidence, under the issues before joined, between the parties aforesaid; that the said several and respective replications lead to great and unnecessary prolixity of pleading, and are, in other respects, evasive, argumentative, insufficient, and informal." Joinder in demurrer.

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Campbell in support of the demurrer. The special replications in this case are clearly bad, both in form and substance. It was impossible for the defendant to take any issues upon them. They are all in effect the same; it will therefore be sufficient to comment on the first. If the defendant had rejoined, and said that the fifty votes rejected were bad, and that had been found against him, it would not have followed that he was improperly elected. So, if upon an issue that the thirty-eight votes mentioned in the replication were not bad, they had been found to be so, still the defendant might have had a majority of good votes. Or if the concluding allegation in the replication, viz. that *Bevan* had a majority of good votes had been denied, that would have admitted the fifty to be good, and the thirty-eight bad.

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bad. But, in fact, the replication admits the thirty-eight to be good votes; for it states the parties to have been corporators de facto, and their titles cannot be impeached in this mode. There are only two cases bearing on the question, *Symmers v. Regem* (a) and *Rex v. W. Smith*. (b) In the former, which was a writ of error from the Court of K. B. in *Ireland*, one question was, whether, on the trial of the right of the elected to a corporate franchise, the rights of the voters to their corporate franchise could be gone into? The case was twice argued: at the close of the first argument Lord *Mansfield* said, "The general question has never been fully settled, though it has been touched upon in many cases. But this is settled, that no corporator is bound by surprise to go into the original qualification of any corporator in possession, who voted for him at his election, especially without notice." After the second argument, His Lordship said, "As to this point, the proposition is, that the Judge on this information should have done exactly what he ought to have done if the title of these persons, who were common council-men de facto, had actually been in question before him upon quo warranto. They were de facto members of the corporation, admitted, sworn, and in the actual enjoyment of the office. The question is, whether the Judge collaterally at the trial ought to have gone into the validity of these men's titles? Could the mayor have gone into it at the election? I am very clear he could not." That is an express authority that the replications are bad as to the thirty-eight votes, alleged to have been

(a) *Cowp.* 489.(b) 5 *M. & S.* 271.

improperly

improperly received, for the replications themselves admit that they were corporators de facto. *Res v. W. Smith* was an information for exercising the office of Mayor of *Colchester*. There were three issues; 1st, whether the then Mayor and the major part of the residue of the aldermen elected the defendant; 2dly, whether he duly took the oaths; 3dly, whether one *Hedge*, who at the election presided and acted as Mayor, was then Mayor. Lord *Ellenborough*, in giving judgment, says, "As to the question, whether it is competent to impeach upon a collateral issue concerning the rights of the elected, the title of the voter, if the case had turned upon it I should have desired further time for consideration. The language of Lord *Mansfield* in *Symmers v. Regem* is certainly very strong; but, upon the competency to enquire into the validity of the election of *Hedge*, the presiding officer at the defendant's election, I cannot entertain a doubt." And the present Lord Chief Justice, as to the first issue, said he thought the case not distinguishable from *Symmers v. Regem*. Those two authorities are decisive against the replications in this case, and the rule laid down in them is very reasonable, for if, in trying the right of the elected, the title of every voter might come in question, it might have been incumbent on the defendant to take a distinct issue as to each voter mentioned in the replication; and then no Judge or jury could have been found capable of going through the investigation.

G. B. Cross contra. The special replications are good, both in form and substance. The substantial question certainly is, whether the relator can question the title of the electors, when investigating that of the elected.

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This question is now presented, for the first time, upon the record. In *Rex v. Latham* (a), the question was discussed upon a motion for a quo warranto information, the rule was made absolute on other grounds, and as to this point, Lord *Mansfield* said, "There is no instance of precluding the crown from insisting upon any objections that they shall be advised to take issue upon in order to shew the defendant to have usurped the franchise. Therefore, we neither need to give, nor should give any opinion upon the other points, nor does the line seem to be fully and clearly drawn and fixed where the rights of the electors can be gone into at all, or how far they can be gone into on the trial of the right of the elected." *Symmers v. Regem* cited on the other side was the next case where the point was raised. There the title of the electors was to a certain extent investigated, for it having been proved that some of them were removed from their corporate rights, evidence of their restoration was admitted; then evidence was tendered to shew that those persons were originally improperly elected, that evidence was rejected, and Lord *Mansfield* thought that the titles of electors could not be investigated, unless notice of the objection were given, either on the record or collaterally; particularly as they had been long in possession of their franchises. Here the objection is stated on the record, and the names of the various voters were introduced in order to obviate the objection taken to the inquiry in that case. In *Rex v. Mein* (b), Lord *Kenyon* alludes to *Symmers v. Regem*, and observes, that there, in deciding that the right of the

(a) 3 Burr. 1485.

(b) 5 T. R. 596.

electors could not be disputed, "Lord *Mansfield* laid considerable stress on the voters having been in the possession of their franchises for twelve years." The last cited case was decided in *E. T.* 30 G. 3., and in the 32 G. 3. c. 58. an act was passed "for the amendment of the law in proceedings upon information in nature of *quo warranto*." By the 3d section it was enacted "That if any person or persons against whom any such information shall be exhibited, shall derive title under an election, nomination, &c. by any person or persons, the title of such person or persons against whom such information shall be exhibited shall not be defeated or affected by reason or on account of any defect in the title of such person or persons so electing, nominating, &c. in case such person or persons, under whom title shall be derived as aforesaid, was or were in exercise de facto of the franchise or office in virtue of which he or they was or were so elected, nominated, &c. at a period six years at least previous to the time of filing such information, and his or their title shall not have been questioned by any legal proceeding carried on with effect." The 1st section had provided that the titles of corporate officers shall not be impeached directly by *quo warranto* after six years; it was therefore reasonable to protect them after that time from being questioned indirectly; but this 3d section would have been altogether unnecessary if before that time the law had been, that the title of electors could not be disputed in an investigation of the title of the elected. Here the defendant might have rejoined that the voters objected to had enjoyed their offices for six years before the election. *Rex v. Smith* was determined on another ground, and cannot in this case be considered as an authority either way; but there are two

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more ancient cases in which the title of electors was inquired into without objection. *Foot v. Prowse*. (a) (*Bayley J.* The question there was not as to the original title of the elector, but as to the duration of his office; he would at the same time cease to be a corporator de facto et de jure.) Still the question tried was, whether at the time of the election the voter was a corporator de jure. And in *Rex v. Hebden* (b), the defendant as bailiff of *Scarborough* made title as elected under the bailiffship of *Batty* and *Armstrong*, and upon issue joined, whether they were bailiffs or not, a record of a judgment of ouster against them was read in evidence, and upon motion for a new trial it was held that it was properly admitted. If then the question can be entered into, the replications are good in substance; they are good in form also: the relator was obliged to introduce into them the rejected votes, otherwise the result would not have arisen, viz. that *Bevan* had the majority of legal votes tendered for him. Nor can this be complained of as leading to an infinity of issues; according to *Symmers v. Regem*, the relator had a right to enter into the rejected votes, and the insertion of their names in the replications gave the defendant a great advantage, as he would be thereby enabled to prepare himself with evidence respecting them.

BAYLEY J. (c) To this information filed against the defendant for usurping the office of mayor of *Monmouth*, he has pleaded that he was elected according to the provisions of the governing charter of the borough. The prosecutor might have replied non debito modo

electus.

(a) 1 Str. 625. (b) 2 Str. 1109. Andr. 389. S. C.
(c) *Abbott C. J.* was absent.

electus. He does not do that, but alleges that 50 votes tendered for another candidate were improperly rejected, and 38 tendered for the defendant were improperly admitted, and that a majority of the legal votes tendered was in favor of *Bevan* the losing candidate. That is merely the conclusion, that the defendant was not duly elected. That was the only proper issue to be taken, and would have raised every question competent to the prosecutor upon this record. In *Rex v. Mein*, Lord *Kenyon* held, that where the electors do not fill a corporate office it is allowable to enter into their titles, in questioning that of the elected, because there is no other mode of doing it. But a distinction has long been recognized between such cases and those of corporators; the titles of the latter must be impeached in a different mode, and this is the first instance in which their claim to be corporators de jure has been attempted to be brought in question by this form of pleading. Nothing could be more mischievous than such a proceeding, for the length of time which would be consumed in such an investigation would render it impossible to have a legal trial. The case of *Rex v. Latham* does not throw any light upon the question; Lord *Mansfield* there treats it as quite undecided. *Rex v. Hebden* differed materially from this case; there the question was upon the right of persons filling a particular office, in virtue of which they were to nominate the candidates, and that case does not show that the title of the electors may be investigated, but that at most you may show the question to have been before determined, as in that case, by a judgment of ouster in a quo warranto. In *Symmers v. Regem* the issue was, "not duly elected," and upon that issue every thing may

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be brought in question which can be investigated in such a proceeding. If a prosecutor were at liberty to show that any one had voted who was not duly qualified, the result would be that the party was not duly elected. The defendant in that case was therefore entitled to give any matter in evidence which would be open to the defendant on this record, and there it was held that he could not give evidence to impeach the votes of corporators *de facto*. In *Rex v. Mein*, Lord *Kenyon* (who is a very high authority upon such points), says, "It is objected that the titles of electors cannot be impeached through the medium of the elected, and the case in *Cowper* has been relied on, but there the electors were members of a corporation whose titles might have been questioned in *quo warranto* informations." He therefore recognizes *Symmers v. Regem*, and takes a distinction between that case and *Rex v. Mein*. These cases were before the 32 G. 2. c. 58. and I certainly do not think that by the 3d section of that act it was intended to extend the power of objecting to the titles of corporators, and perhaps it was meant to be applicable to head or presiding officers, although that is certainly made doubtful by the introduction of the word *election*. *Rex v. Smith* stands upon a different footing. The defendant had been elected mayor of *Colchester* at a meeting holden before one *Hedge*, and unless *Hedge* were at the time mayor *de jure*, there could not be a good corporate meeting, consequently it was open to the prosecutor to question his title. Upon the whole therefore, inasmuch as the object of these replications was to rest the prosecutor's case upon the liability of certain voters to ouster at the time of the election, and as according to the rule of law, which has been con-

sidered as settled ever since the decision of *Symmers v. Regem*, that question cannot in this proceeding be entered into, it appears to me that the replications are bad, and that our judgment must be for the defendant.

1825.

The King
against
Hughes.

HOLROYD J. It is a fundamental principle of pleading, that you must confess and avoid or traverse some one material fact, and the same rule applies to replications as to pleas. The question to be tried in this case, is, whether the election of *Hughes* was good or not. The prosecutor could only put that in issue by a direct and not by an argumentative denial of the validity of the election. These replications state a number of facts, from which a conclusion of, "not duly elected," is to be drawn. Upon that short ground, it is clear that the replications are bad. As to the other points, it is obvious, that many nice questions may arise as to whether an officer is so de facto or not; sometimes that may be so combined with the question of title de jure, that they cannot be served. But when a person is in possession of the office, his title cannot be thus questioned. Where there has been a judgment of ouster, he is no longer in possession of the office; that judgment, if without fraud, is conclusive according to the case of *Rex v. Mayor of York*. (a) But without further entering into that, I am of opinion, that the first is a decisive objection to the replications.

LITLEDALE J. I am of opinion, that our judgment must be for the defendant. Even if the prosecutor were at liberty to dispute the titles of the voters, still he could

(a) 5 T. R. 66.

1825.

The KING
against
HUGHES.

not have judgment upon these replications. He should have replied generally that the defendant was not duly elected, whereas this is only an indirect and argumentative denial of the validity of the election. Again, suppose the defendant had rejoined and taken issue as to each voter, and some had been found one way, some the other, it would not have thence appeared which candidate had the majority of legal votes, for the whole number no where appears upon the record. In every point of view, therefore, the replications are insufficient.

Judgment for the Defendant.

BROMFIELD *against* JONES Esq.

Declaration for an escape stated, that the plaintiff in *E. T.* 5 G. 4. in *K. B.* recovered against one *H. W.* 79^l. as by the record appeared, that in Trinity Term in 5th year aforesaid, such proceedings were had in the said Court that it was considered

ACTION against the Marshal for an escape. The declaration stated that the plaintiff, in *Easter* term 5 G. 4. in *K. B.*, recovered against one *Hale Wortham* 79^l, as by the record and proceedings thereof still remaining in the said court appeared; that in *Trinity* term in the 5th year aforesaid such proceedings were had in the said Court; that it was considered by the same Court that the plaintiff should have his execution against the said *H. Wortham* for the damages aforesaid, accord-

that the plaintiff should have execution against the said *H. W.* for the damages aforesaid, according to the force, form, and effect of the said recovery, by default of the said *H. W.*, as by the record of the said last mentioned proceedings still remaining in the said Court appears, and thereupon on, &c. in *T. T.* in the 5th year aforesaid, the said *H. W.* was committed to the custody of the marshal in execution for the damage aforesaid, and escaped. Plea, Not Guilty. At the trial the plaintiff proved the original judgment in *K. B.* and that a committitur issued thereon, but he did not prove any judgment in *scire facias*. It was held that the allegation of the judgment in *scire facias* was immaterial, and need not be proved.

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ing to the force, form, and effect of the said recovery, by default of the said *H. Wortham*, as by the record of the said last-mentioned proceedings still remaining in the said Court of our Lord the King more fully and at large appears; and *thereupon*, on *Wednesday* next after three weeks of the Holy Trinity, in *Trinity* term in the 5th year aforesaid, the said *H. Wortham* was committed to the custody of the said defendant, then being Marshal of the *K. B.*, in execution for the damages aforesaid, there to remain until he should satisfy the said plaintiff the said damages; but that the defendant, not regarding the duty of his said office as Marshal, suffered the said *H. Wortham* to escape. Plea, Not Guilty. At the trial before *Abbott C. J.* at the *Middlesex* sittings after last *Michaelmas* term, the plaintiff proved the original judgment recovered in the Court of *K. B.* and the commitment to the Marshal, but he did not prove any judgment in *scire facias*. It was objected by the defendant, that, in order to support the allegation in the declaration that execution was awarded by the Court of *K. B.*, the plaintiff was bound to prove a judgment in *scire facias*, more especially as there was a positive allegation that the defendant was *thereupon* committed. The Lord C. J. reserved the point, and there was a verdict for the plaintiff, with liberty for the defendant to move to enter a nonsuit. A rule nisi having been obtained for that purpose.

1825.

BROMFIELD
against
JONES.

Denman and *Chitty* now shewed cause. The original judgment is described correctly in the declaration; and although the declaration then sets out that which may be considered a judgment in *scire facias*, yet it describes what actually took place, viz. a commitment to the Marshal. If the allegation following the original judgment were

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BROMFIELD
against
JONES.

were struck out of the declaration, there would still be a sufficient cause of action, for the writ of execution is described as issuing on the original judgment. The word *thereupon* does not expressly refer to the scire facias.

Campbell contra. A scire facias is for some purposes a new action, and a solemn judgment is given upon it. Suppose the declaration had stated a judgment in *K. B.*, and that it was affirmed on error in the Exchequer Chamber, and thereupon a *ca. sa.* issued, would it not have been necessary to prove the judgment in the Exchequer chamber? If the plaintiff within a year after judgment sue out a scire facias, he cannot have a *capias* afterwards within the year until he has a new judgment in the scire facias, *Roberts v. Pising*. (a) The *ca. sa.* therefore, must be founded on the judgment in *sci. fa.* So is the committitur in this case, and it could not be proved without proof of the judgment in *sci. fa.* In *Webb v. Herne* (b), which was an action against a sheriff for an escape, the plaintiff averred in the declaration that *J. S.* was arrested under a writ indorsed for bail by virtue of an affidavit then on record. It was held, that he must produce the affidavit in evidence, though the latter part of the averment was unnecessary. In *Turner v. Eyles* (c) the declaration stated that the prisoner was brought before the Judge, and by him committed to the custody of the Marshal, as by a writ of habeas corpus, and the commitment thereon remaining of record appeared; and evidence of a commitment by a Judge of *K. B.* not of record was held to be insufficient. Besides, in the present case, the word *thereupon* connects the committitur with the judg-

(a) *T. 15 Car. 1. Rolls' Abr. Execution, Q.* (b) *1 Bos. & Pul. 281.*

(c) *5 Bos. & Pul. 456.*

ment immediately preceding. It amounts to an allegation that the defendant was committed upon *that* judgment; then, assuming the allegation of the judgment in scire facias to be immaterial, still the plaintiff has, by his mode of pleading, made another material allegation to depend upon it, and therefore it was necessary to prove it.

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against
JONES.

BAYLEY J. A party is not bound to prove an immaterial allegation, unless he has by his mode of pleading so connected it with a material allegation as to make the latter depend upon it. That is laid down by *Buller J.* in *Peppin v. Solomons* (a). He there refers to a case of *Savage v. Smith* (b), where in debt against a bailiff for extorting illegal fees, &c. the declaration stated that *R. Thomas*, in *Trinity* term 15 G. 3. recovered against *J. Moreing* 51*l.* 12*s.*, which judgment being in force, the said *R. Thomas* sued out a fieri facias upon the said judgment to levy the debt, &c.; that the writ was delivered to the sheriff, who made his warrant to the defendant to levy; that he levied the debt besides poundage, and exacted from *Moreing* 1*l.* 1*s.* more. The plaintiff did not prove the judgment, and the defendant contended that he was bound to do so. *Buller J.*, in commenting on that case, says, "I admit it was not necessary for the plaintiff to state the judgment, but as the plaintiff alleged that the party recovered a judgment, and that he sued out a writ of execution upon the said judgment, the execution was necessarily tied down by that judgment, and therefore the judgment was made material by the subsequent words which were introduced. So in actions for words where a long intro-

(a) 5 T. R. 496.

(b) 2 Blacks. 1101.

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BROMFIELD
against
JONES.

duction is unnecessarily inserted in the declaration, if the charge be tied up to that introduction the latter must be proved, because the material part is thus made to depend on the immaterial part of the declaration." Now apply that rule to this declaration. It states that a judgment was recovered in *K. B.* in *Easter* term 5 *G. 4.*, and that in *Trinity* term in the same year there was an award of execution by the Court; and thereupon a commitment of the defendant to the custody of the Marshal. All these allegations have been proved, but the defendant has failed in proving, as his allegation imports, that there was any judgment in *scire facias*. That was of itself an immaterial allegation, because a *scire facias* was unnecessary, a year not having elapsed after the original judgment was obtained. That being so, has the plaintiff made it necessary by his declaration to prove it? Does any material allegation in the declaration depend on the *scire facias*? It has been contended that the word *thereupon* so connected the judgment in *scire facias* with the commitment, as to make it necessary for the plaintiff to prove the former. I think not. That word seems to me to be introduced to mark the progress of the cause. The declaration states that the defendant was charged in execution for the damages aforesaid, viz. the same damages mentioned in the judgment in *K. B.* If the damages in the award of execution had been different from those in the judgment, it would have been a fatal variance; but I think every material allegation has been proved; this rule must, therefore, be discharged.

HOLROYD J. I think that the plaintiff is entitled to recover. A party must recover *secundum probata et allegata*. He cannot recover upon one statement by

proof of another, either where the action is founded on contract or a record; but if the plaintiff states as a cause of action more than is necessary for the gist of the action, the jury may find so much proved and so much not proved; and the Court would be bound to pronounce judgment for the plaintiff upon that verdict, provided the facts proved constituted a good cause of action. Here there is an allegation that a judgment was recovered in *K. B.* in *Easter* term, and then another unnecessary allegation, "that by the consideration of the Court execution was awarded, and thereupon the defendant was committed. The original judgment was proved; the commitment was also proved. That was all that was material in order to shew that the defendant was committed lawfully to the custody of the Marshal. I think also the words, "that he was *thereupon* committed," amount to an allegation of fact, not to a description of the record upon which the commitment took place; and that being so, the verdict was properly found for the plaintiff.

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BROMFIELD
against
JONES,

LITLEDALE J. I think that the allegation of the award of execution by *scire facias* was quite unnecessary. Even if the execution was not taken out till after the year and day expired, it would not have been necessary to allege the *scire facias* upon the record, for a party may often sue out execution without a *sci. fa.*, and if he do this when he ought to have sued out a *scire facias*, still that would only be a ground of application to the Court to set aside the execution for irregularity, and would not be a justification to the Marshal in an action for an escape. It appears to me that the allegation is so immaterial, that had it been of any length
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BAUMFIELD
against
JONES.

the Court might have referred it to the Master to have it struck out of the declaration.

Rule discharged.

Monday,
June 20.

NIAS against SPRATLEY.

After a judge's order making it imperative for a defendant to plead within a given time, and no plea within that time, the plaintiff may sign judgment without giving a rule to plead.

BY a Judge's order of the 16th *April*, upon payment of the debt and costs on or before two o'clock on *Wednesday* the 20th of *April*, all further proceedings in this action were to be stayed, the defendant undertaking, in default of such payment, to receive a declaration and to plead thereto, within the first four days of the next term. The debt and costs not having been paid, a declaration was delivered, and the defendant not having pleaded within the time limited, the plaintiff signed judgment, without giving any rule to plead. A rule nisi having been obtained for setting aside this judgment for irregularity,

Chitty now shewed cause. It is laid down in *Tidd's Practice*, 7th edition, 486, that unless the defendant be bound by rule of Court, or order of a Judge, to plead by a time therein limited, a rule to plead must be entered in all cases, whether the defendant have appeared or not; and where he has appeared, there must also, in general, be a demand of plea. Now here the defendant was bound by a Judge's order to plead within the time limited, and he comes, therefore, within the exception to the general rule; and *Pearson v. Reynolds* (a) is an authority to shew that, after a Judge's order obtained for time to plead, a demand of plea is not necessary.

(a) 4 *East*, 570.

Archbold contra. All the authorities referred to by Mr. *Tidd* in support of the position that, after a Judge's order for time to plead has been obtained, a rule to plead is not necessary, were, with one exception, cases decided in the Court of C. P. *Starkie v. Wilkes* is the only case stated to have been decided in this Court, and that is taken from *Crompton's Practice*, 166. There is a material difference between the practice of this Court and that of the Common Pleas in this respect. In this Court, before judgment be signed, a rule for judgment must be obtained; but in the C. P. there is no rule for judgment. Now a rule to plead is equivalent in this respect to a rule for judgment.

1825.

 NIAS
 v.
 SPRATLEY.

BAYLEY J. I have no doubt in this case that it was not necessary to give any rule to plead. The notes cited by Mr. *Tidd*, in support of the position laid down by him, are of themselves of considerable authority. In *Brandon v. Payne* (a), it was held, that a plaintiff might sign judgment if the defendant pleaded in abatement after the four days, although there was no rule to plead. That decision proceeded upon the ground that a party might dispense with the rule to plead, and that he had done so by pleading in abatement. So in *Perry v. Fisher* (b), the irregularity of giving a rule to plead before the delivery of a declaration was held to be waived by the defendant's putting in a plea of non assumpsit to an action of debt, the plea itself being a nullity. Here the defendant undertook to plead within the first four days of the term, and I think that was a virtual agreement

(a) 1 T. R. 689.

(b) 6 East 549.

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1825. by him to dispense with the rule to plead. That being so this rule must be discharged.

Nias
vs.
Spratley.

HOLROYD and LITTLEDALE Justices, concurred.

Rule discharged.

Tuesday,
June 21st.

BARROW, Administratrix, against CROFT.

MARSDEN against SAME.

The court will not order a Judgment Roll to be taken off the file, although it was not carried on for 24 years after the judgment, that having been regularly docketed.

A RULE had been obtained by *Manning* calling upon the plaintiff *Barrow* to shew cause why the Judgment Roll in the first mentioned action should not be taken off the file of this Court. It appeared that the judgment in each action had been obtained in Hilary Term, 1799, but that the Judgment Roll in the first action was not regularly carried in at the time, and indeed not until Michaelmas Term, 1824, though it was marked by the proper officer at the time, and was regularly docketed. The fees were paid at the time, and also the number of the Roll obtained.

D. F. Jones now shewed cause. The act of carrying in the Roll may be done at any time, and in practice it is continually postponed. The rule of Court of Easter Term, 5 *W. & M.*, is only directory to the officers, and does not affect the rights of plaintiffs. *Odes v. Woodward* (a) may be relied on by the other side, but it appears from the report of that case in *Salkeld* 87. 3 *Salkeld* 116. that the judgment was *not docketed*, and purchasers therefore might have been prejudiced. But here the judgment was docketed, and purchasers therefore had notice. But further, the plaintiff in the second

(a) 2 *Ld. Raym.* 849.

action is no purchaser, nor can he be considered as standing in the same situation.

1825.

BARROW
against
CARR.

Manning in support of the rule. If the present judgment Roll can be allowed to remain on the files of the Court, there can be no limit to the delays of attornies in carrying in Rolls. The plaintiff in the second action having recovered her judgment is to be considered as standing in the same situation as a purchaser. The rule of 5 William & Mary (a) will be altogether nugatory unless it be held that after the periods specified in that rule no judgment Rolls can be carried in. In *Odes v. Woodward*, as reported by Lord Raymond, it does not appear that any stress was laid by the Court upon the judgment not having been docketed.

ABBOTT C. J. As we learn from the officers that in practice it has been usual to permit the judgment Rolls to be carried in at periods long subsequent to the time prescribed in the rule of Court, I think that we are bound to say, that the rule must be taken to be merely directory. The present case materially differs from *Odes v. Woodward*, for the reason assigned at the bar. I think therefore that the rule must be discharged. But in order to shew our disapprobation of the negligence and delays of attornies, I think that it should be discharged without costs.

The other Judges concurring,

Rule discharged without costs.

(a) By that rule, it is ordered that the clerks of the chief clerk of this Court shall bring into the office of the chief clerk the rolls of *Easter* term at or before the *Tuesday* next before the first day of *Trinity* term; and that they shall bring into the office their rolls of other terms (*T. M.* and *H.*) by the space of one week, at least, before the *essoin* day of every subsequent term; and that no roll shall be received or filed after the end of the second term, without a rule of this Court in that behalf obtained.

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NIAS
vs.
SPRATLEY.

H.

Tuesday,
June 21st.

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DECLARATION by the plaintiff as second indorsee of a bill of exchange, bearing date the 17th April 1821, for 50*l.* against the defendant, the indorser. The bill was drawn by one Jackson, upon one Edward Buyers, and accepted by him, and indorsed by Jackson to the defendant, and by him to the plaintiff, and was payable two months after date. At the trial before Abbott C. J. at the London sittings after Michaelmas term, the plaintiff proved the hand writing of the several parties to the bill, and that it was presented for payment when due, and that payment was refused, and that due notice of dishonor was given to the defendant, and that the plaintiff then immediately commenced actions by original against the acceptor and the defendant. For the defendant, evidence was tendered that pending these actions, the plaintiff on the 15th of September 1824, took from the acceptor a warrant of attorney for the debt and costs, amounting to 71*l.*, which was to be paid by instalments, 10*l.* on the execution of the warrant of attorney, 5*l.* on the 22d September, 5*l.* weekly until the whole should be paid; and on default made in any one payment the whole was to become due, and judgment to be entered up and execution issued. The acceptor paid the instalments regularly until the 27th October, when he made default. And it was urged that this arrangement discharged the defendant.

Quere whether the taking of the warrant of attorney from the acceptor was under the circumstances a giving of time so as to discharge the other parties to the bill.

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It was contended on the part of the plaintiff, that as the warrant of attorney was taken after action brought against the acceptor, and the defeazance was to pay by instalments, all of which would become due before the time when judgment could, according to the common course, be obtained; the defendant had sustained no injury, and that as the matter of defence arose after action brought, it could not be received in evidence under the general issue. The Lord Chief Justice received the evidence, but reserved the point. The plaintiff attempted to prove that the defendant knew and assented to the taking of the warrant of attorney. Upon that point the evidence was contradictory, and the Lord Chief Justice left it to the jury to find for the plaintiff, if they believed that the defendant concurred or assented to the taking of the warrant of attorney, otherwise for the defendant. The jury found for the defendant, but the plaintiff had leave to move to enter a verdict for him on the objection taken, that the other facts proved were not an answer to the action. A rule nisi was obtained in last Hilary term.

1825.

Lxx
against
LEVY.

Gurney and *Chitty* now shewed cause. The jury have found that the warrant of attorney was taken without the knowledge or approbation of the defendant. Now it is a general rule that giving time to the acceptor discharges a subsequent indorser, unless it be done with his assent. Unless, therefore, the circumstances of the warrant of attorney having been taken after the plaintiff had commenced an action against the acceptor alters the case, the defendant is discharged. The effect of the warrant of attorney was to preclude the plaintiff from proceeding in the action against the acceptor, until

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default

1825.

 LEE
 against
 LEVY.

default was made in the payment of the instalments; and if he had continued to prosecute the action, the acceptor might thereby have been induced to pay the whole amount of the bill long before all the instalments became due. *English v. Darley (a)* is precisely in point; that was assumpsit by the indorsee of a bill of exchange against the indorser; payment of the bill being refused when due, the plaintiff commenced actions against the defendant and the acceptor, and having sued the latter to judgment, took out execution thereon; but although the acceptor had sufficient to answer the execution, the plaintiff at his instance received 100*l.* in part payment of the bill, and took his bond and warrant of attorney as a security for the payment of the remainder by instalments, together with interest and costs, excepting only a nominal sum with a view to enable him, the plaintiff, to support actions against the other parties to the bill, and it was held that the defendant was discharged. In that case the warrant of attorney was taken after the judgment had been obtained in the action against the acceptor, and yet it was held to be a giving of time to the acceptor, and that the indorser was discharged.

Brougham and *Platt* contra. By taking this warrant of attorney, the plaintiff did not give any time to the acceptor. An action had been commenced, and pending that action the plaintiff took from the acceptor the warrant of attorney to pay the debt, together with the costs then incurred, by several instalments, all of which would become due before the time when in the common course of things a judgment could have been obtained against the acceptor. By that arrangement the de-

(a) 2 Bos. & Pul. 61.

defendant

fendant has sustained no prejudice; for if the acceptor had continued to resist the action, judgment could not have been obtained against him at an earlier period than it was entered up on the warrant of attorney. Besides, here the defendant having had notice of the dishonor of the bill, it was his duty to pay the amount to the holder immediately; *Badnall v. Samuel (a)*, is an authority to shew, that under the circumstances of this case, the defendant is not discharged. Besides, the matter of defence having arisen after the commencement of the action, could not be given in evidence under the general issue.

1825.

 LEE
against
LEE.

Cw. adv. vult.

ABBOTT C. J. After stating the facts of the case proceeded, as follows :

The jury have found that the warrant of attorney was not given with the privity and approbation of the defendant. It was contended, however, by the plaintiff's counsel, that, as the warrant of attorney was not taken until after the commencement of the suit, it was no answer to the action, and we are all of that opinion. The question, whether a matter arising after action brought can be pleaded in bar of the action, was very fully considered in the case of *Le Bret v. Papillon (b)*. There this Court, on the authority of *Evans v. Prosser (c)*, (which over-ruled two other cases in which it had been held, that *actio non* applied to the time of plea pleaded) decided, that no matter of defence, arising after action brought, could properly be pleaded in bar of the action generally, but that it should be pleaded in bar of the *further maintenance* of the action. Considering

(a) 3 Price, 521.

(b) 4 East, 502.

(c) 5 T. R. 188.

1825.

 Lee
 against
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default was made in the payment of the instalments; and if he had continued to prosecute the action, the acceptor might thereby have been induced to pay the whole amount of the bill long before all the instalments became due. *English v. Darley (a)* is precisely in point; that was assumpsit by the indorsee of a bill of exchange against the indorser; payment of the bill being refused when due, the plaintiff commenced actions against the defendant and the acceptor, and having sued the latter to judgment, took out execution thereon; but although the acceptor had sufficient to answer the execution, the plaintiff at his instance received 100*l.* in part payment of the bill, and took his bond and warrant of attorney as a security for the payment of the remainder by instalments, together with interest and costs, excepting only a nominal sum with a view to enable him, the plaintiff, to support actions against the other parties to the bill, and it was held that the defendant was discharged. In that case the warrant of attorney was taken after the judgment had been obtained in the action against the acceptor, and yet it was held to be a giving of time to the acceptor, and that the indorser was discharged.

Brougham and *Platt* contrà. By taking this warrant of attorney, the plaintiff did not give any time to the acceptor. An action had been commenced, and pending that action the plaintiff took from the acceptor the warrant of attorney to pay the debt, together with the costs then incurred, by several instalments, all of which would become due before the time when in the common course of things a judgment could have been obtained against the acceptor. By that arrangement the de-

(a) 2 Bos. & Pul. 61.

fendant

fendant has sustained no prejudice; for if the acceptor had continued to resist the action, judgment could not have been obtained against him at an earlier period than it was entered up on the warrant of attorney. Besides, here the defendant having had notice of the dishonor of the bill, it was his duty to pay the amount to the holder immediately; *Badnall v. Samuel (a)*, is an authority to shew, that under the circumstances of this case, the defendant is not discharged. Besides, the matter of defence having arisen after the commencement of the action, could not be given in evidence under the general issue.

1825.

 LEE
 against
 LEVE.

Civ. adv. vult.

ABBOTT C. J. After stating the facts of the case proceeded, as follows :

The jury have found that the warrant of attorney was not given with the privity and approbation of the defendant. It was contended, however, by the plaintiff's counsel, that, as the warrant of attorney was not taken until after the commencement of the suit, it was no answer to the action, and we are all of that opinion. The question, whether a matter arising after action brought can be pleaded in bar of the action, was very fully considered in the case of *Le Bret v. Papillon. (b)* There this Court, on the authority of *Evans v. Prosser (c)*, (which over-ruled two other cases in which it had been held, that *actio non* applied to the time of plea pleaded) decided, that no matter of defence, arising after action brought, could properly be pleaded in bar of the action generally, but that it should be pleaded in bar of the *further maintenance* of the action. Considering

(a) 3 Price, 521.

(b) 4 East, 503.

(c) 5 T. R. 183.

1825.

LEE
against
LEVY.

that the matter of defence, insisted upon in this case, arose after the original was sued out, we are of opinion, upon the authority of the two cases of *Evans v. Prosser*, and *Le Bret v. Papillon*, that it could not be pleaded in bar of the action generally, and, consequently, that it was not admissible in evidence under the general issue, and, therefore, the rule for entering a verdict for the plaintiff must be made absolute.

Rule absolute.

Tuesday,
June 21st.

MORDY against JONES.

In an action on a policy of insurance on freight it appeared, that the ship in the course of her voyage having been injured by a peril of the sea, was obliged to put into a port and land the whole of her cargo. Part of the cargo had been so wetted by sea water that it could not be reshipped without danger of ignition, unless it went through a process which would have detained the vessel six weeks, and have been attended with expence equal to the freight. Under these circumstances the master sold these goods, and finding he could not obtain others, he sailed on his voyage, and arrived at his port of destination with the rest of his cargo. The master's proceedings were such as a prudent man uninsured would have adopted: Held, that the underwriters were not liable for the loss of the freight of these goods.

THIS was an action on a policy of insurance subscribed by the defendant on the 10th of *February* 1821, for 250*l.* on the freight of the ship *Isabella*, at and from *Kingston* in *Jamaica* to *Liverpool*. The cause was referred to the arbitration of *Campbell*, who stated the facts of the case upon his award. On the first of *February* 1821, the vessel sailed from *Kingston*, on the voyage insured, having on board a cargo of cotton, coffee, sugar, hides, and other goods, shipped by various persons for consignees in *England*, with bills of lading in the usual terms; but a plank having started in violent weather, the ship was obliged to put back to *Kingston*, when, after a survey, it was found necessary to land the whole of the cargo. This was, therefore, done, and the accident was repaired, but part of the

cargo had been so wetted by sea water, in consequence of the starting of the plank, that it could not be re-shipped without danger, from ignition, to the ship and the rest of the cargo, unless it underwent a process of washing with fresh water, and then drying in the sun, which would have detained the vessel six weeks, and been attended with expence equal to the freight. Under these circumstances, the shippers of these goods refusing to interfere, but approving of a sale by the master, the master sold them, and finding he could not obtain other goods to complete his cargo in any reasonable time, and being pressed by the shippers of the rest of the cargo to proceed, he sailed for *Liverpool*, carrying with him the net proceeds of the damaged part of the cargo. On arrival at *Liverpool*, he paid over these proceeds to the parties interested without retaining the freight of the goods sold. The master's proceedings in *Kingston* were such as a prudent man, uninsured, would have adopted. The arbitrator found that there was such a loss of freight of the goods so sold as entitled the plaintiff to recover, and in *Hilary* term,

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 against
 JONES.

F. Pollock was called upon to support a rule which he had obtained for setting aside the award. The question raised is of the first impression, and certainly is one of great importance, as by the decision of the arbitrator, the underwriter was made liable to a total loss of freight, the goods being only partially injured, and requiring only delay, and the ship continuing capable of earning the freight. An insurance on freight is a peculiar contract, and does not admit of a partial or average loss. Such a claim has never been recognized. The insurance on freight is an insurance depend-

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ing on both ship and goods, and is independent of any partial loss of either. The underwriter on freight cannot be called upon to contribute to the repair of the vessel, to enable her to earn the freight, nor to the expences incurred in relation to the goods, in order that they may be carried forward. His liability arises only upon a total loss of one or other of the subjects (ship and goods) insured in this qualified way. It is true, the total loss may be actual, as by the ship or goods going to the bottom of the sea ; or constructive, as where a ship is so injured as not to be worth repairing, or goods are so damaged as to be incapable of being carried on ; but that was not the case in this instance. The ship was repaired and completed ; the voyage and the goods were capable of being forwarded, after a certain process, and they required only a little time and expence. It might not have been worth while for the captain to wait for this particular quantity of goods ; but the underwriter on freight does not guarantee that the freight shall be worth earning ; but merely, that neither the ship nor the goods shall be reduced, by the perils insured against, to such a state, that the freight *cannot* be earned. The case of *Milles v. Fletcher* (a), will perhaps be relied on by the plaintiff ; but, in that case, there was a constructive *total* loss of the vessel, and the admitted consequence of that is, that the underwriters on freight are liable. It is clear, that if the vessel alone had been injured, but capable of repair, the underwriter on freight would not have been liable, if the owners of goods had refused to wait till the ship was repaired, and had taken their goods forward in other vessels. So, if the vessel

(a) *Doug.* 251.

had

had been uninjured, but all the goods damaged, so as to require a delay, which would consume in expences all the freight to be earned, the master could not have sailed without the cargo, and have called on the underwriters for a total loss. The same principles apply to this case where part of the cargo has been damaged. The ship continued able to take the goods; and, after the process of washing, the goods were capable of being taken; but it was more convenient not to wait for them. Then shall the underwriter on freight be liable? To decide so, would be to make him liable for every damage, and enable the master to turn such damage into a total loss, in every case where his interest required it.

1825.

 Meant
 against
 Jones.

Park contra. The assured claim a total loss of the freight of part of the goods; and, in order to recover, it is admitted they must establish, first, that there has been a total loss of that freight, and, secondly, that it was occasioned by perils of the sea. As to the first point, it is clear that no freight was earned, for the goods were not carried on the voyage. The only question is as to the second point, whether the loss was occasioned by the perils of the sea. The ship and cargo were both injured by those perils, and the consequence was, the loss of this freight: for it is an established rule in the law of marine insurance, that when a peril insured against has occurred, the underwriters are liable for a loss arising from the act of the assured or his agent, the master conducting himself, in consequence of that peril, as a prudent man uninsured would have done. Such a loss is to be considered as caused by the original peril. That is laid down by

Lord

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Measure
against
Jama.

Lord Mansfield, in *Milles v. Fletcher* (a). The case itself is in point, for that was an insurance on the freight, as well as on the ship. A peril insured against happened by capture, and the question was, what was the loss sustained in consequence of that peril? and it was decided that the loss of the freight, which was directly occasioned by the act of the captain, in selling the cargo and leaving the ship behind, was a consequence of the peril insured against. The same rule is laid down and exemplified in the case of *Green v. The Royal Exchange Assurance Company* (b). This rule, therefore, must be considered as completely established; and it is a reasonable rule, for no other will give a complete indemnity to the assured. The underwriters on freight must be taken to have understood, on subscribing the policy, that the assured, whenever a loss happened, would conduct himself fairly, as if uninsured, with reference to the interest of all concerned; and not that he would attend exclusively to those of the underwriters on freight, and incur an unwarrantable expence for the purpose of earning it. Two supposed cases have been put on the other side: one, of the ship being damaged, and the goods taken back by the owners; another, of the goods being so damaged as to require a delay which would cost more than the value of the freight. The answer to the first case is, that it is not possible to conceive that a prudent man, uninsured, would have given back the goods, without receiving freight; and to the second, that if such a person could have left the goods behind, the underwriters would be liable. It is admitted on the other side, that there may be a total loss of freight to charge the underwriter, though the ship

(a) *Dougl.* 231.(b) 1 *Marsh.* 447. 6 *Taunt.* 88.

is not lost; as if she be not worth repairing: and yet it might be said in that case, as well as this, that the underwriter on freight had nothing to do with the repairs of the ship; and that the loss was occasioned by the default of the assured, in not incurring the expence of a repair, as it was said to be incurred in this, by his not choosing to incur the expence of delay. The only reasonable rule, which will secure a full indemnity to the assured, is, that a loss occasioned by acts such as, in the ordinary course of affairs, are adopted in consequence of the peril, is a loss occasioned by that peril, and that the underwriters are liable for it.

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 against
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F. Pollock in reply. It would be very dangerous to give the master the power of deciding whether it was the interest of all parties not to wait. In the cases of insurances on ship and goods, or both, as the underwriter is liable for repairs of the ship, or for damage to the goods, the master may safely be entrusted with a discretion not to repair, and treat it as a total loss, if the repairs would be more than the value of the vessel, or the damage to the goods leaves nothing worth preserving; but the reason wholly fails, as applied to an insurance on freight, upon which a partial loss creates no claim; and it would be most dangerous to leave it to the discretion of the master, who would have to decide, not whether the underwriters on freight should be liable for a total or partial loss, but whether he should be liable at all or not.

Cur. adv. vult.

The judgment of the Court was now delivered by ABBOTT C. J., who after stating the facts of the case, pro-

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MORBY
against
JONES.

proceeded as follows:—The question was, whether under these circumstances the underwriter was answerable *pro tanto* for the freight of these goods, thus reloaded and left behind? and there appears to be no case or decision exactly in point, and yet such an occurrence must probably have happened many times, and upon the whole we are of opinion, that the underwriter was not liable for the freight of these goods. It may be very true, that the most prudent thing for the master of the ship might be to leave the goods behind, and sail without them; but it does not, therefore, follow that the underwriter is to make good the freight thereby lost. If it should be held in a case of this kind, that the underwriter would be liable to make it good, it would open a temptation to the master of a ship to sail away under circumstances like these, instead of stopping until the goods could be reshipped, which would be very mischievous. We think inconvenience would result by laying down a rule which should make the underwriter answerable in a case of this kind. It is very proper that the master should exercise a discretion whether it be more fit to leave the goods behind, and give up the value of the freight, than to bring them home. But it by no means follows as a consequence that if he does in the sound exercise of his discretion leave part of the goods behind, and his owner thereby loses freight *pro tanto*, that he can throw that loss on the underwriter. This being the opinion of the Court, the rule must be made absolute for setting aside the award.

Rule absolute.

1825.

PALMER AND ANOTHER *against* FORSYTH AND
BELL. *Wednesday, June 22d.*

ARCHBOLD shewed cause against two rules, one for quashing a writ of habeas corpus cum causa, the other for quashing a writ of certiorari and return which had issued in this case, and for a procedendo. It appeared by the affidavits, that an attachment issued out of the Court of Pleas, at *Berwick*, at the suit of the plaintiffs in the following form, directed to the serjeants at mace of that court. "Arrest the goods of *T. Forsythe* and *T. Bell*, in an action upon the case, at the suit of *Palmer* and *A. B.* to their damage 200*l.* Take good bail for 162*l.* 2*s.* 6*d.*" Bail was taken in the following form, "In the Court of Pleas, *Berwick.* *Palmer* and *A. B.* plaintiffs, and *Forsythe* and *Bell* defendants. Bail for the defendants, *J. M. G. M..*" A writ of habeas corpus cum causa, issued on the 13th of *April*, the return to which set out the attachment and bail-piece, and stated that at the next court after the bail, a plaint was entered, and that the defendants had not been otherwise in custody. On the 20th of *April*, and before the return of the habeas corpus, a writ of certiorari issued, directing the Mayor, &c. of *Berwick* to send to this court "the plaint, with all things touching the same, fully and intirely as it remains in court." The return set out copies of the attachment, bail piece and plaint, and then proceeded, "and so the said precept, action, bail piece and plaint, are still remaining in the said court undetermined, and this is the tenor of the record and process

A cause cannot be removed by *habeas corpus cum causa*, from an inferior court, unless the defendant is actually or constructively in custody.

Where a certiorari issued to remove a cause from an inferior court, and the court below returned a copy of the record and not the record itself, this court quashed the writ and return, and awarded a procedendo.

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PALMER
against
FORSTH.

process of the said plaint. It was sworn to be the practice in the Court of Pleas at *Berwick*, that when goods are attached and bail is given, the goods are returned to the defendant, and not to the bail. No appearance is entered for the defendant, and on final judgment execution issues against the goods of the defendant and the persons of the bail, not against the person of the defendant, over which the bail have no power. When goods are attached, the defendant cannot discharge them by surrendering himself to prison. Against the rule for quashing the writ of habeas corpus, it was contended that as it appeared by the bail piece, that bail was given for the defendant, he was constructively in custody, and that consequently the proper mode of removing the cause was by habeas corpus. [*Abbott C. J.* It appeared that the effect of giving bail was to release the goods, and that the bail had no power at all over the body of the defendants; the case is, therefore, like that of *Mitchell v. Mitcheson* (a), and the writ of habeas corpus must be quashed.] Then the certiorari must be proper, and at all events a procedendo cannot be awarded, for the record having been removed into this court, cannot be sent back to the court below.

G. R. Cross contra. The certiorari issued before the habeas corpus had been returned, that was irregular and a sufficient cause for quashing the writ; but the return is also irregular, the record itself has not been returned but merely copies of the different proceedings.

Per curiam. The case of *Mitchell v. Mitcheson* is decisive as to the writ of habeas corpus. The writ of

(a) 1 B. & C. 512.

certiorari must also be quashed, because it has been improperly returned. A copy only of the record has been returned, instead of the record itself. It is said that a procedendo cannot be awarded, because a record once removed cannot be sent back, but the record has not been removed, both rules must therefore be made absolute.

1825.

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PALMER
against
FOSTER.

Rules absolute.

BEVAN *against* JONES, Esq.

Wednesday,
June 22d.

DECLARATION stated that one *Sophia Sanders* heretofore, to wit, on, &c., was indebted to the plaintiff in the sum of 200*l.* in respect of certain causes of action before then accrued to him the plaintiff; and being so indebted, the plaintiff, for recovery of the debt, to wit, on, &c. sued and prosecuted out of the Court of *K. B.* a special *capias ad respondendum*, directed to the sheriff of *Middlesex*, by which said writ the sheriff was commanded to take the said *Sophia Sanders*, &c. and her safely keep, so that he might have her body in fifteen days of *Easter* before our Lord the King, to answer the plaintiff in a plea of trespass on the case, upon certain promises therein mentioned, to the damage of plaintiff of 200*l.*, as it was said, &c.; which said writ was duly marked and endorsed for bail for 120*l.* and upwards, and was delivered to the sheriff of *Middlesex* to be executed; that the sheriff arrested the

Where a declaration against the marshal for an escape alleged that one *S. S.* was arrested and gave bail, that afterwards bail above was put in before a judge at chambers, "as appears by the record of the recognizance," that *S. S.* surrendered in discharge of the bail and afterwards escaped: Held, that the plaintiff was bound to prove that bail above was put in as alleged, and that the averment was not made out by the production of the filaster's book, the entry therein importing that the recognizance was taken before a single judge, an examined copy of the entry of the recognizance of bail, stating that the recognizance was taken before the Court at *Westminster*, having also been given in evidence.

said

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against
JONES.

said *S. Sanders*, and detained her in custody for the cause aforesaid, and took bail for her appearance; that afterwards, and whilst the said plea was pending in the said Court of *K. B.*, to wit, at the return of the said writ in the same *Easter* term, in the 5th year, &c., before Sir *J. Bayley*, Knight, one of the justices of the said Court, &c., came *Charles Hatch* and *William Miller*, in their proper persons, and then and there acknowledged themselves, and each of them did acknowledge himself, to owe to the said plaintiff the sum of 258*l.*, and then and there did consent for themselves, and each for himself and their heirs, that the said sum should be made of their lands and chattels, and levied to the use of the said plaintiff, upon the condition that if judgment should happen to be given in the said Court for the plaintiff against the said *S. Sanders* in the said plea, that then the said *S. Sanders* should pay and satisfy all such damages, &c. or render herself, &c., as by the record of the said recognizance, &c. more fully appears; that on the 13th day of *May*, in the said *Easter* term, &c., the said *S. Sanders* surrendered herself in discharge of her said bail, at the suit of the said plaintiff, in the plea aforesaid; and was, thereupon, committed by Sir *Charles Abbott*, Knight, &c. to the custody of the marshal, &c., there to remain, &c., as by the record of the said surrender, now remaining in the said Court, more fully appears. The declaration then alleged, that the defendant suffered the said *S. Sanders* to escape. Plea not guilty. At the trial before *Abbott C. J.*, at the *Middlesex* sittings, after last *Michaelmas* term, the plaintiff proved the issuing of the writ as stated in the declaration and the arrest, and an examined copy of the entry of the recognizance of bai

stating, that the recognizance was taken before the Court at *Westminster*. An objection being made, that this did not sustain the allegation, that the recognizance was taken before a judge at chambers; the plaintiff produced the filazer's book, from which it appeared, that *Charles Hatch* and *William Miller* became bail above, and that entry imported, that the recognizance was taken before a single judge; and it was proved, that where bail is so taken, before a judge at chambers, the entry of the recognizance states it to have been taken before the Court. On the part of the defendant it was still objected, that the plaintiff was bound by the allegation in his declaration, to prove a recognizance of bail, taken before *Sir J. Bayley* at chambers. The Lord Chief Justice reserved the point; and the plaintiff obtained a verdict. A rule nisi for entering a nonsuit having been obtained in Hilary term,

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against
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Scarlett and *Chitty* now shewed cause. The variance in this case, between the statement and the proof of the mode in which bail was given, is not a sufficient ground for entering a non-suit. The substantial allegations were, that bail was given, that *S. Sanders* was rendered in discharge of her bail, and afterwards escaped. Whether bail was put in before a judge at chambers, or in court, the result was the same; and, therefore, the allegation that bail was put in before a judge at chambers, was satisfied by the filazer's book, which shewed that bail had been put in before a single judge; it was not necessary to produce a recognizance, purporting to be taken before him. The statement of the place where bail was put in was surplusage, and not matter of description; it was, therefore, unnecessary to prove it, *Wigley v. Jones*(a),

(a) 5 East, 440.

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Purcell v. M'Namara (a), *Phillips v. Shaw* (b), *Draper v. Garratt*. (c) It will, perhaps, be urged, that the plaintiff is bound by his reference to the record, the recognizance of bail being pleaded with a *prout patet per recordum*; but that reference is clearly surplusage; and, in a very recent case, *Stoddart v. Palmer* (d), it was held by this Court, that such an averment did not bind the plaintiff to prove that which was surplusage.

Campbell contra. It must be admitted that if the allegation in question can be rejected as surplusage, the ground of this motion fails. But it cannot be so rejected, for in all actions against officers for escapes, it is necessary to shew how the party came into custody. In *Purcell v. M'Namara*, *Phillips v. Shaw*, and *Stoddart v. Palmer*, the variance was merely as to the time when the judgment was obtained, and there was no description of the judgment itself; they are, therefore, perfectly distinguishable from this case. In certain cases, bail may and must be taken before a judge at chambers, and the entry of the recognizance on the roll would describe it as so taken. An entry of a recognizance describing the bail as taken before Mr. Justice Bayley would have supported the allegation in this case, which, therefore, cannot be supported by an entry of a recognizance before the Court at Westminster. In *Wigley v. Jones* (e), the commitment was on mesne process only. Here it was essential for the plaintiff to shew how the prisoner came into custody; the proof did not support the allegation, and as the subsequent allegations de-

(a) 9 East, 157.

(d) 3 B. & C. 2.

(b) 4 B. & A. 435.

(e) 5 East, 440.

(c) 2 B. & C. 2.

pended

pended upon it, the variance is fatal, *Webb v. Herne* (a),
Turner v. Eyles. (b)

Cur. adv. vult.

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BAYLEY J. This was an action against the marshal for an escape. The declaration stated, that a debtor had been arrested and gave bail to the action, and afterwards surrendered in discharge of her bail, and was thereupon committed by my Lord Chief Justice to the custody of the marshal. In the statement of giving bail to the action, the allegation was, that the bail came before me, at my chambers, in *Serjeant's Inn*, and acknowledged to owe a sum of money, 258*l.*, upon condition, that if judgment should happen to be given for the plaintiff, the defendant should pay and satisfy all damages, or render herself to the marshal. And this allegation was followed up by an averment *prout patet per recordum*; plea of not guilty was pleaded. Upon the trial, the plaintiff produced the entry of a recognizance of bail, and the entry of special bail in the filazer's book to verify this allegation. But the former imported not that the recognizance was taken before me, at *Serjeant's Inn*, but, in court at *Westminster*, and the latter imported that bail was put in before me, but did not state whether it was put in at chambers or in court. And on motion for a nonsuit, the question was, whether this was evidence to support the averment in the declaration. There was other evidence to shew, that upon a recognizance taken before a judge at chambers, it was the course of proceeding to enter it as if it were taken in court. It was not disputed, but that this was an essential part of the plaintiff's case, for though the debtor was committed by the Lord Chief Justice, the validity of that commitment de-

(a) 1 B. & P. 281.

(b) 3 B. & P. 46.

1826.

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against
JONES.

pendent on the previous allegation that bail above was put in ; for until that was put in, there could be no render in discharge of bail, and no valid commitment. The point insisted on was, that the allegation, as to the recognizance of bail, was matter of inducement only, and that the plaintiff was at liberty to prove by evidence, dehors the recognizance, that it was, in fact, taken before me at chambers, and that the course of the Court was to enter them as if taken in court. *Purcell v. M'Namara (a)*, and *Stoddart v. Palmer (b)*, were relied upon. The first of those cases was an action on the case for a malicious prosecution, and it was held not to be necessary to prove the exact day of the plaintiff's acquittal, as laid in the declaration, inasmuch as it appeared to have been before the action brought ; and, therefore, that a variance in that respect, between the day laid and the day stated in the record, which was produced to prove the acquittal, was not material. In the latter case, the action was for a false return to a fieri facias, and the declaration stated that the plaintiff in *Trinity* term, 2 G. 4., by judgment recovered, *as appears by the record*, and the proof was of a judgment in *Easter* term, 3 G. 4. ; and this was held to be no variance, because the averment, *as appears by the record*, was surplusage, and might be rejected, inasmuch as the judgment was not the foundation of, but mere inducement to the action. To those cases we readily subscribe. But do they lead to a conclusion in favor of the plaintiff in this case ? Whether the acquittal was at one time or another, it was equally an acquittal, and whether the judgment was of one term or another, it was equally a judgment. But ~~whether~~ this be or be not a recognizance, depends upon the question, whether the acknowledgment was made before

(a) 9 East, 157.

(b) 3 B. & C. 2.

competent tribunal. A judge is competent to take it, and the Court is competent to take it, but it might be taken either by the Judge or by the Court, and it is essential to state that it was taken before the one or the other. There is a difference in effect between a recognizance taken in court and one taken before a judge at chambers, for the scire facias in the former case must be in the county in which the Court sits; in the latter it may be either in that county, or in the county in which it is taken, *Hall v. Winckfield* (a), *Kenny v. Thornton*. (b) In the cases relied on by the plaintiff, there was nothing new introduced in the evidence, there was only a failure of proving a non-essential description; but in this case there must be the introduction of new matter to prove an essential and indispensable fact. Although a recognizance in this Court is not considered a record until it is entered, as appears by *Shuttle v. Wood* (c), yet when entered it is a recognizance from the first acknowledgment, and, as a record, from that time binds person and lands. That is laid down in *Hall v. Winckfield*. (d) Then the only possible evidence of it, is the record, and no extrinsic evidence can be resorted to, to prove a record, much less to contradict it. If evidence were allowed to be given by the filazer's book, that bail was put in before the Judge at chambers, it would be necessary to go further, and give parol evidence of what was done in each case, to shew what were the terms of the recognizance, according as the action was, by original or not. The Book mentions the word *bail* (e), but can the Court take notice of the meaning of the word 'bail?' Unless they

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 BEVAN
 against
 JONES.
(a) *Hobart*, 195.(c) *Salkeld*, 564.

(b) 2 W. Bl. 768.

(d) *Hobart*, 195.

(e) The form of the entry in the filazers book is as follows:
 Taken and acknowledged { A. B. is delivered to bail to C. D. and E. F.,
 before me. J. Bayley. } at the suit of G. H.

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 DEYAN
 against
 JONES.

can, there must be parol evidence given of what the recognizance was, therefore it would be in part proved by parol. In the cases cited the records produced supported the allegation, because it made out the whole that was alleged, except an immaterial part which might be rejected as surplusage, and, therefore, required no proof. But in this case the entry of the recognizance did not support the allegation, for it varied from it in a very essential particular, the allegation was, that the recognizance was entered into before me in *London* at my chambers. The record which was produced in evidence purported that it was in the court at *Westminster*. The record produced, therefore, does not support the allegation, but contradicts it, and the parol evidence contradicts the record produced, for it is to shew that, though it purported to be taken in court, it was not taken in court, and that purporting to be taken where the court sat, it was not taken there, but in *London*. *Shuttle v. Wood* (a), in Salkeld 564.-659 and 6th Mod. 42. is exactly the converse of this, and there the variance was held to be fatal. It was an action of debt on a recognizance. The recognizance was stated to have been taken in the Court of Common Pleas, before the Lord Chief Justice and his companions. The defendant pleaded nul tiel record. The record produced imported that the recognizance was entered into before Mr. Justice *Nevil*, at his chambers in *Serjeants' Inn, London*, and by him brought into court, and whether that was a failure of the record was the question. It was argued, that it was the constant practice of the Court of Common Pleas, for above twenty years, to recite recognizances taken at the Judges' chambers as taken in court, but *Holt* Chief Justice answered, "The they must make their entry so, or else their usage

(a) By the names of *Chetty v. Wood*.

contri

contrary to law. Here the entry is made, that the recognizance is taken in *London* before a judge in his chambers; and it was held by the whole Court, that there was a fatal variance." The only difference between that case and this is, that the recognizance was the gist of the action, and here it is inducement only; but though it was inducement only, it was an essential allegation, and required proof; and as the entry of record is the only possible evidence of it, whether it is a substantive allegation, or whether it is only inducement, there was a failure of proof, and the rule for a nonsuit must be made absolute.

1825.

BEVAN
against
JONES.

Rule absolute for a nonsuit.

HARRIS *against* SAUNDERS.

Tuesday,
June 21.

ASSUMPSIT on a judgment obtained in *Hilary* term 1821, in the Court of Common Pleas in *Ireland*. The plaintiff having obtained a verdict, a rule nisi had been obtained for arresting the judgment, upon the ground that since the union assumpsit would not lie on any such judgment.

A judgment obtained in one of the superior courts in *Ireland* since the union is not a record in *England*, and assumpsit is maintainable upon such a judgment.

Marryat and *Selwyn* shewed cause. Assumpsit is maintainable on a foreign judgment, *Crawford v. Whittal* (a), *Bowles v. Bradshaw* (b), *Plastow v. Van Uxem*. (c) The question is, whether since the act of union a judgment obtained in *Ireland* is a record of this country. By the act of union 39 & 40 G. 3. c. 67. "all laws in force at the time of the union, and all courts of civil and eccle-

(a) *Douglas*, 4.

(b) 5.

(c) *ib.*

1825.

HARRIS
against
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siastical jurisdiction within the respective kingdoms, shall remain as now by law established within the respective kingdoms, subject only to such alterations and regulations, from time to time, as circumstances appear to the parliament to require." Since the union with *Scotland* and *Ireland* assumpsit has been frequently brought on *Scotch* decrees and on *Irish* judgments. In *Vaughan v. Plunkett (a)* assumpsit was brought in this country on a judgment obtained in the Court of Exchequer in *Ireland*, and *Chambre J.* reserved the point, whether since the union a judgment obtained in *Ireland* was a record, but the defendant acquiesced in the verdict found against him. In *Collins v. Lord Mathew (b)*, the question was not decided. The Court gave judgment on the ground that the plea ought to have concluded to the country. But, assuming that debt may be maintained, it does not follow that assumpsit will not lie. It is not necessary to bring debt in this country on a recognizance of bail taken in *Ireland*. The practice of bringing actions of debt upon such recognizances, probably arose from the necessity of suing in that mode upon recognizances in the nature of statute staple which are under seal. Debt lies on all contracts for the payment of money, but assumpsit lies on almost any such contract. The antecedent liability on the judgment is a good consideration for a promise. If it be a record, still it is to be proved before a jury by a copy, *Collins v. Lord Mathew*. A plaintiff, therefore, is at liberty to declare either in assumpsit or in debt.

Evans contra. Debt is the proper form of action on a record. *Comyn's Digest*, tit. Debt. A. 2. It lies upon

(a) 3 Taunt. 85.

(b) 5 East, 475.

a judg-

a judgment given in a foreign court. But in that case the judgment is not a specialty, and the grounds of it may be shewn and impeached by the defendant. The question is, whether since the union a judgment given in *Ireland* is a record of this country? The only instance where assumpsit appears to have been brought on a judgment given in *Ireland* is *Vaughan v. Plunkett* (a), and it does not appear what ultimately became of the case. There may, perhaps, have been instances where assumpsit has been brought on decrees of the courts in *Scotland*, but no objection to the form of action having been taken, they do not decide what the law is. In *Collins v. Lord Mathew* (b), this Court intimated a clear opinion, that since the union the judgments of the *Irish* Courts were properly pleadable as records. The act of union makes *Great Britain* and *Ireland* one country, and a record of one part of the country is a record of the whole. *Walker v. Witter* is an authority to shew that nul tiel record cannot be pleaded to a foreign judgment; and *Collins v. Lord Mathew* shews that it is a proper plea to an action brought on an *Irish* judgment. [Abbott C. J. Have you considered whether in the distribution of assets a judgment given by one of the superior Courts in *Ireland* is considered entitled to priority in *England* as a specialty debt, or a mere simple contract debt?] In *Otway v. Ramsay* (c), the question was mooted, whether an *English* judgment was to be considered as a simple contract debt in *Ireland*, but it does not appear to have been decided.

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(a) 3 Taunt. 85.

(b) 5 East, 475.

(c) 2 Str. 1090. Vin. Ar. Ireland. (E.) pl. 5.

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ABBOTT C. J. There is another difficulty in this case. If this is to be considered a judgment in this country, it will bind the land. These points were not considered in *Collins v. Lord Mathew*. The act of union says, "that all laws in force at the time of the union shall remain." Now, before the union, a judgment given in *Ireland* would not bind lands in this country. To hold that it would since the union, would have the effect of altering the law. Adverting to those consequences as at present advised, we think, that assumpsit will lie, but as these points may have come upon the defendant by surprise, we will discharge the rule nisi, giving the defendant's counsel a few days to consider these points.

The case stood over to this day when the Lord C. J. said, that since the argument, Selwyn had furnished the Court with a note of the case of *Otway v. Ramsay* (a), by which it appeared to have been

SO

(a) *Otway v. Ramsay*, S. C., shortly reported in 2 *Strange*, 1090. 14 *Viner*, 569. tit. *Ireland*. (B.) B. R. Hil. 7. 10 G. 2.

Error from the Court of *King's Bench*, in *Ireland*, on a judgment given in the Court of Common Pleas there, in an action of debt brought against the defendant (who was made executrix to her husband) upon a judgment here, to which action defendant pleaded that her husband upon their intermarriage entered into articles with trustees to leave her the sum of 3000*l.* by his will, and gave a bond for the performance of it, and that in fact he did not leave her 3000*l.* by his will; and that the husband in his lifetime confessed a judgment upon this bond, by which she became entitled to this 3000*l.*, and that she had not assets ultra. To this plea there was a demurrer and joinder, and judgment in both courts there given for the defendant.

Taylor argued for the defendant in error, and *Chapple Serjt.*, contra.

Lord HARDWICKE C. J. said, he did not intend to give any opinion in this case, but as it was to be argued again, he would break the case little for the better information of those who were to speak to it again. In this case there were two principal questions: —

solemnly decided, after two arguments; that before the union, a judgment given in England had not the force and effect in Ireland, of a judgment of record in that

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1st. Whether an action of debt will lie in *Ireland* upon a judgment given in a superior court in *England*?

2d. If such action will lie, if any priority or preference is to be given in *Ireland* to a judgment obtained in *England*, before a judgment obtained in *Ireland*, or vice versa?

The cases cited as to the jurisdiction of counties palatine are not to the present purpose, because those counties are, and ever were, part of the kingdom of *England*, whereas *Ireland* is only part of the Crown of *England*. Nor can any argument be drawn in this case from our superintending the laws of *Ireland*, because they are only considered there as coming by way of appeal. For as *Ireland* is a province to *England*, and consequently is subject to be bound by our laws, and is so bound by our statutes where named in them, it is necessary that *Ireland* should submit to the final interpretation and judgment of this kingdom. And the reason is because that the power of giving a final exposition and construction of a law is equal to a power of making it; for in such a case *Ireland* might expound the law as they pleased, and so defeat the very intention of the law-makers; wherefore it is absolutely necessary that the kingdom of *England*, which gives laws to *Ireland*, should have the final determination of those laws. But this is an action of debt brought in *Ireland* upon a judgment given in *England*, which judgment given in *England* cannot be executed in *Ireland*, because we cannot send our writ to the sheriff in *Ireland*. And the reason of a judgment given hereupon a writ of error on a judgment in *Ireland*, being executed in *Ireland*, is, because we can from this court certify to the court in *Ireland* our proceedings here. And a judgment in *England* cannot bind lands in *Ireland* because we cannot send a writ to the sheriff to extend lands there.

The principal doubt in this case is, that the Courts in *England* and *Ireland* proceed in this case by the same rules of law; and therefore it seems hard if a judgment given here should not be *Res Judicata* in *Ireland*. For in proceedings by the civil law where all nations proceed by the same rules a sentence given in one nation is held valid by another; wherefore a sentence given in *France* by the Court of Admiralty there for the condemnation of a ship, is, by a proper certificate of the Court, held valid here. So I shall be glad to have it insisted on the next time it is argued, what credit is to be given by one Court, to the acts of a Court of another nation, proceeding both by the same rules of law. It is very desirable

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that country. The effect of the decision was, that a judgment in one country was not to be considered as a matter of record in the other; so as to bind land, or to have

desirable in such case that the judgment given in one kingdom should be considered as *Res Judicata* in another.

Then, as to the preference of those judgments, it is a question which much concerns both *England* and *Ireland*. As a judgment in *England* is no lien on lands in *Ireland*, so neither can it bind the goods and chattels there; for no writ can be sent hence to the sheriff there to levy them. Wherefore it seems as if a judgment given in *England* should not have the same power and equality in *Ireland* with a judgment given there. And suppose an action of debt brought against an executor upon a judgment given there, is that executor to send over to *England* to search all the courts in *Westminster* to see whether any judgment is given against his testator there? And will it be a *devastavit* in him if he does not do it? A debt due to the King is prior to any debt due to any subject in *England*, but in case the King's debt is not upon record, the executor may prefer the subject's debts without incurring a *devastavit*: so the reason seems to hold in this case, for a judgment given in *England* is not a matter of record in *Ireland*.

The other judges said nothing to it, and it was ordered to be argued again.

Mich. Term, 11 G. 2.

This case coming on again, Serjt. Parker argued at great length for the plaintiff, and Denison for the defendant. Lord HARDWICKE C. J. I think *Ireland* must be considered as a provincial kingdom, part of the dominions of the crown of *England*, but no part of the realm. It is a question of very great consequence whether an action of debt will lie in *Ireland* upon a judgment given in *England*. The case of *Muggrave v. Wharton*, *Yel.* 218., seems to prove that actions of debt upon judgments must be considered as a local matter. So does the case of *Hall v. Winckfield*, *Hob.* 195. Nor has any good authority been cited in opposition to these cases, only the anonymous case in *Salkeld*, 209., and *Comb.* 220., and *Salk.* 459. contradict that case: so I think that case can have no great weight. I do not apprehend that the want of jurisdiction in the courts of *Ireland* need have been pleaded, for in *England* these courts have a general jurisdiction over the whole kingdom, so that if they are to be deprived of it, the defendant must shew, by pleading, that he has a right to be sued in the counties palatine or elsewhere, which clearly differs from the case in the courts of *Ireland*. Executors and administrators must at their peril take notice of debts that are upon record, or they will be liable

have priority as a specialty debt. He then asked the counsel for the defendant if he had any further argument to urge to the Court.

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to a devastavit, and there is an express case to that purpose in *Cro. Elis.* 793., *Littleton v. Hibbins*, where upon a scire facias against executors, it was held immaterial to plead that they had no notice of the judgment. It is certain that acts of parliament made in *England* do not affect *Ireland*, unless it be particularly expressed. And since that is so, it would be very strange that the judgment of the courts here should affect that kingdom. If they were to do so, executors and administrators could never safely act. The case in the Register 43. is very extraordinary. The distinction taken is very proper, between mandatory writs which issue to all inferior courts and jurisdictions whatsoever, and ordinary or remedial writs which are only for the benefit of the subject; and this is taken notice of in *Vaughan*, 290. And there the writs of error are held to be an argument of superiority, for if there were not writs of error from an inferior or provincial kingdom, as *Ireland* is to *England*, they might, by expounding and interpreting the laws after their own manner, render them quite ineffectual. These mandatory writs are in the nature of prerogative writs.

PAGET J. I am of the same opinion in regard to the locality of actions upon judgments; the courts of *Ireland* have records of their own, to which any of the subjects of that kingdom may at any time resort; and therefore they must take notice of them: but they cannot have such access to the judgments of these courts which are recorded here, and, therefore, I think they cannot be obliged to take notice of our judgments; when their judgments are affirmed here by writ of error, they are put in execution there by writs mandatory to their judges, and are executed as judgments of *Ireland* affirmed, and not as judgments of this Court. Supposing the record has been transmitted, I do not see how it would be a record of that kingdom; and if it be not, it cannot take place of what is already a judgment there.

PAGE J. I think the actions brought upon judgments must be local; and as this has been determined in regard to the different counties of *England*, sure it ought to hold between the kingdoms of *England* and *Ireland*.

CHAFFLE J. If the plaintiff cannot recover his loss, it is very hard; for the defendant does not plead that she has administered all the effects in her hands, but confesses she has assets, and submits it to the Court how she

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Evans. It must be admitted, that before the union, a judgment obtained in one kingdom would not have been considered a judgment of record in the other. But the question is, whether, the two countries having by the act of union become one kingdom, a record of one part of the kingdom is not a record of the whole? It is true, that an article of the union declares, that all laws then in force are to remain the same; but, before the union, assumpsit would not lie on a record, nor will it now. It certainly has been the practice since the union to declare in debt on an *Irish* judgment; and to plead nul tiel record. *Parkins v. Stewart.* (a)

ABBOTT C. J. We do not say that the action of debt may not be maintained on an *Irish* judgment; but if it be a record in this country, it must have all the consequences of a record; it must bind lands, and rank as a specialty debt in the distribution of personal assets. I have enquired of a very learned person, whether in marshalling assets it is considered to be entitled to priority as an English judgment; and the result of that enquiry is, that it is not. Upon the whole, we are of opinion that the rule for arresting the judgment must be discharged.

Rule discharged.

she shall dispose of them. This debt seems to be of such a nature as can hardly be sued for in *Ireland*. If he were to bring an original action there, it would be pleaded in bar that he had already recovered in *England*, for this is now become a debt upon judgment here, which before was only a debt upon a simple contract; so that the plaintiff is really in a worse condition by reason of the diligence he has used to obtain judgment for his debt; for this judgment prevents his bringing an action in *Ireland*, where possibly he might recover his debt.

Per Cur. to stand over.

The judgment was afterwards affirmed in *Easter* term, 11 G. 2. without any argument.

(a) 9 Price, 1.

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TAYLOR *against* BUCHANAN.Wednesday,
June 22.

DEBT for goods sold and delivered. Pleas nil debet and set off. At the trial before *Littledale J.* at the sittings after *Michaelmas* term 1824, the plaintiff proved a debt of 8*l.* 5*s.* for oats sold and delivered on the 31st *May* 1823. The defendant proved a set-off for medicines, to the amount of 44*l.* 18*s.* 11*d.* The plaintiff, in reply, put in his discharge by the Insolvent Debtors' Court, whereby it appeared that his petition was heard on the 10th *March* 1823, and by which the Court adjudged, that he should be discharged forthwith, as to the several debts specified in his schedule, except a certain debt of 78*l.*, fraudulently contracted with one *Charles Mann* (not the defendant's demand), and that in respect of *Mann's* demand he should be kept in prison for nine months. Upon the production of the plaintiff's schedule, exhibited in the Insolvent Debtors' Court, it appeared that the defendant's demand was set down as amounting to 8*l.* 0*s.* 8*d.* only, instead of 44*l.* 18*s.* 11*d.*, the sum proved. Upon this the defendant's counsel insisted that the plaintiff was not competent to contract at the time of the supposed sale, he being in custody at that time under the order of the Insolvent Debtors' Court. That the plaintiff's discharge could only extend to the sum specified in the schedule, and that as the difference between that sum 8*l.* 0*s.* 8*d.* and the sum proved 44*l.* 18*s.* 11*d.*, exceeded the demand for which this action was brought, the plaintiff ought to be nonsuited. The learned judge permitted the plaintiff to recover a verdict for 8*l.* 5*s.*, with liberty to the defendant to move

An insolvent may sue upon a contract of sale made by him subsequently to the hearing of his petition by the court for relief of insolvent debtors, and while he was detained in prison by their order. The effect of the discharge is to relieve the insolvent only to the extent of the specific debts described in the schedule.

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D. F. Jones moved accordingly to enter a nonsuit, and contended, first, that the plaintiff could not sue in respect of a contract made during the time for which he was remanded by the Insolvent Debtors' Court. This was not a demand for the labour or personal earnings of the plaintiff (a), but for goods sold and delivered; and at the time of the alleged sale, the plaintiff's liberation had not taken place, and all his property belonged to the assignees under the Insolvent Debtors' Act. The Court, however, referred to the case of *Kitchen v. Bartsch* (b), and said that in the absence of any intervention by the assignees, it did not seem to lie in the mouth of the defendant to resist the claim, on the ground of the incompetency of the plaintiff to contract, and they refused the rule as to that point. But they granted him a rule nisi upon the other point, viz. whether the discharge of the insolvent was confined to the amount of the debt mentioned in the schedule.

Scarlett and Hutchinson shewed cause. The discharge by the Insolvent Debtors' Court operated as an extinguishment of the whole demand. The insolvent acts take from the insolvent the whole of his property, to be distributed amongst his creditors, and their plain meaning is, that he shall be discharged from the claims of all the creditors mentioned in his schedule. All such creditors have notice given to them in pursuance of the provisions of the Insolvent Debtors' Acts, and it is their own fault if they do not apply to have the amount of their debts set right, provided there be any mistake in

(a) *Chippendale v. Tomlinson*, Cooke's B. L. 451.

(b) 7 East, 53.

the insolvent's schedule, for by the 1 *Geo. 4. c. 119. s. 16.* any opposing creditor may require that it shall be referred to the officer of the Insolvent Court to examine into the truth of the prisoner's schedule, and to report to the Court. The acts of parliament intended a full discharge to the insolvent, and it would be hard upon him if he were to be rendered liable at a subsequent period for the difference between the sum specified in the schedule, and any amount which any of his creditors might afterwards establish upon a trial.

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D. F. Jones contra. The hardship is not upon the insolvent but upon the creditor; for the insolvent has the power of preventing any difficulty, but the creditor has not. According to stat. 1 *Geo. 4. c. 119. s. 4.*, the prisoner's *petition* is to state the amount of the debts. By the 6th section, the *schedule* also is to specify the amount of the debts and claims, distinguishing such as shall be admitted, from such as shall be disputed by the prisoner. By the 16th section, the *discharge* is to specify the debts to which such discharge shall apply. The *dividend* is to be according to the sum stated in the schedule, and the *judgment as to the future effects* follows in the same way. It is the duty of the prisoner to state the full claim of the creditor; he need not admit it, but may insert it as a disputed claim. The notice to the creditor specifies no sum, and even if it did, the creditor would have no remedy, for the 16th section of the 1 *Geo. 4. c. 119.* only gives power to opposing creditors to guard against collusion, between the insolvent and a particular creditor, by sifting the claims admitted in the schedule, but gives no power to the opposing creditor to increase the amount of his debt, as specified in the schedule, nor

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does it give any power to the Court to adjudicate with respect to any excess claimed beyond the sum which the schedule states. The power intended to be given to the Court for the punishment of fraudulent insolvents would be defeated, if the construction contended for on the part of the plaintiff could be allowed to prevail.

Cur. adv. vult.

ABBOTT C. J. now delivered the judgment of the Court, and after stating the facts of the case, proceeded as follows: When cause was shewn against the rule for entering a nonsuit, there was one point upon which the Court took time to consider, viz. whether the discharge extended to the whole debt due from the insolvent, or only to so much as was mentioned in the schedule? If the whole debt was discharged, then the plaintiff would be entitled to recover, because the whole debt owing by him which was the subject of set-off would be extinguished; but, if the plaintiff was only discharged from the amount mentioned in the schedule, which was 8*l.* 0*s.* 8*d.*, then there would remain a set-off to the amount of more than 36*l.*, and as that sum exceeded the plaintiff's demand, the plaintiff ought to be nonsuited. By the statute 1st G. 4. c. 119. sec. 4., the prisoner may apply for his discharge, and the petition is to state, amongst other things, the amount of the debts for which he shall be detained, and to pray a discharge from custody, and to have liberty of his person against the demands for which he shall be in custody, and against the demands of all persons who shall claim to be creditors of the prisoner, and the prisoner at the time of subscribing the petition shall execute a conveyance and assignment of his estate and effects, as the Court shall direct, to the provisional assignee of the Court

Court. By sec. 6. the prisoner shall, within the time mentioned in the act, "deliver into Court a schedule containing a full and true description of the persons to whom he shall be indebted, or who to his knowledge or belief shall claim to be his creditors, together with the nature and amount of the debts and claims of such persons respectively, distinguishing such as shall be admitted from such as shall be disputed by such prisoner." By sec. 7. when the Court shall adjudge a prisoner entitled to his discharge, the Court shall appoint an assignee of the estate and effects of the prisoner for the purposes of the act, and then after giving directions as to what is to be done with the effects, it goes on to provide, that if the assignee has in his hands any balance whereof a dividend may be made amongst the creditors of the prisoner whose debts are expressed in the schedule, the assignee shall declare the amount of the balance in his hands, where-with the dividend shall be made; and every creditor, whose debts shall be stated *admitted* in the prisoner's schedule, shall be allowed to receive a share of such dividend, unless the prisoner or his assignee or any other creditor of the prisoner shall object to the debt, in which case, the same shall be examined by the Court, and the decision of the Court upon such claim shall be conclusive with respect to the dividend. By sec. 16. the Court shall cause notice to be given to the creditors, and to be inserted in the Gazette, and shall appoint a day to hear the matter of the petition. Any creditor may oppose the discharge of the prisoner, and on the hearing, the Court, if they think it necessary, may refer it to the officer of the Court to investigate the accounts of the prisoner, and to examine into the truth of the schedule, and the Court may proceed on the other matters

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in opposition to the discharge of the prisoner, and in case the prisoner shall not be opposed, and the Court shall be satisfied with the schedule, and that the prisoner shall be entitled to the benefit of the act, then the Court shall so declare, and shall order the prisoner to be discharged out of custody, and shall in such order specify the several debts of the prisoner to which such discharge shall apply. By stat. 3 G. 4. c. 123. sec. 5., the Court shall have the same power to examine all debts in the schedule, whether admitted or disputed, as by the 1st G. 4. c. 119. s. 16. as to the debts stated to be admitted. By sec. 6. In the adjudication, that any prisoner is entitled to the benefit of the act, and the order thereon, it shall not be necessary to specify the creditors as required in 1st G. 4. c. 119.; but it shall be sufficient to refer in such order to the schedule of such prisoner, specifying such creditors as to whom the Court shall adjudge the prisoner to be entitled to the benefit of the act.

The whole course of proceeding, therefore, under the acts has reference to the schedule. Whether the debt be admitted or disputed, the Court are empowered either by the 16th section of the 1st G. 4. c. 119. or the 5th section of 3 G. 4. c. 123. to investigate the accounts of the prisoner, and to examine the debts in the schedule. The 16th section of the 1st G. 4. c. 119. directs the Court to specify in the order the debts to which the discharge shall apply. The 6th section of 3 G. 4. c. 123. dispenses with this, and directs that it shall be sufficient to refer to the schedule, and the schedule appears to be the only thing which is to be the guide to determine what the debts are from which the prisoner is to be discharged.

If any other debts could be the subject of discharge, it would then become necessary to inquire into the validity

dity of the debt, and the time when contracted, and other circumstances, but all these circumstances ought to be inquired into by the Court for the relief of insolvent debtors, and it is upon that inquiry that the Court pronounces the discharge. If other debts are allowed to be discharged, a prisoner would get rid of them without going through the ordeal of the Court, and without being subject to the punishment which that Court may impose in case of misconduct.

It may be hard upon the creditor who has not the whole of his debt inserted in the schedule, that he is not entitled to the benefit of a dividend upon the whole of his debt, because, as all the effects of the insolvent are assigned, the creditor cannot have any practical good effect of any action which he might be disposed to bring for the difference. Whether upon application to the Court, the Court may, upon investigation of the accounts of the prisoner, direct the debt to be increased, it is not necessary to say; but if not, there is not any reason to apprehend that such hardship would often occur, because if the prisoner is not discharged from the whole, unless the whole is inserted in the schedule, he has a direct interest in seeing that the whole debt is inserted, and it may be expected that he will take care to do so.

We are, therefore, of opinion that the debt of 36*l.* 18*s.* 3*d.* being the difference of 44*l.* 18*s.* 11*d.*, the whole, and the 8*l.* 0*s.* 8*d.* mentioned in the schedule, still remained as a debt, and might be set-off against the plaintiff's demand, which was only 8*l.* 5*s.*, and as it exceeds the plaintiff's demand he was not entitled to recover, and the rule for entering a nonsuit must be made absolute.

F f 3

Rule absolute

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The KING against HILL. (a)

INFORMATION in the nature of quo warranto, for usurping the office of burgess of the town and borough of *Monmouth*. Pleas, first, that the burgesses have from That *M.* is an ancient borough, and the burgesses a corporation by prescription, consisting of an indefinite number. That from time immemorial a court has from time to time been holden (amongst other things) for the election of burgesses, and notice of holding the court has been immemorially given by ringing a certain bell within the town and borough. And that the burgesses, or so many of them as choose, have a right to attend that court; and being present and attending there, have elected and have a right to elect at their discretion such persons to be burgesses as they think fit. That before the information, to wit, on, &c. notice of holding the court was given by ringing the bell, that the court was holden, and the defendant elected a burgess. Plea 3d set out a charter of *Ed. 6.*, and that from the time of the charter the mode of electing burgesses hath been for the mayor, bailiffs, and burgesses, being met and assembled for that purpose, at a certain court holden in and for the town and borough before the mayor and bailiffs, (notice having been given for holding the said court by the ringing of a certain bell within the town and borough) have elected burgesses at their discretion. That the mayor, bailiffs, and burgesses being in due manner met and assembled at the said court, holden before the mayor, &c. for the election of burgesses, (notice having been given of holding the court by ringing the bell) elected defendant a burgess. Plea 3d recited the charter, and averred that it contained no directions as to the election of burgesses. That the mayor, bailiffs, and burgesses, on, &c. met and assembled at a court holden before the mayor and bailiffs for the election of burgesses (notice having been given of holding the court by ringing a bell) elected the defendant a burgess. Plea 4th that the mayor, bailiffs, and burgesses being met and assembled for that purpose at a meeting of the corporation at the Guildhall, have from time immemorial elected burgesses; and that notice of holding such meeting during all the time aforesaid hath been given, and ought to have been given by ringing a certain bell within the said town and borough. Pleas 5th and 6th varied from the 3d and 3d only by substituting "met and assembled for that purpose at the Guildhall," for "at a certain court holden, &c." 7th plea set out a custom to hold a court before the mayor and bailiffs every *Monday*, and that the burgesses for the time being "being met and assembled for that purpose" at the said court, have elected burgesses. That on, &c. the said court was holden for the election of burgesses, and that the burgesses "then and there so met and assembled together as aforesaid," elected the defendant. Plea 8th set out a nonexistent bye-law, providing for the election of burgesses in the same manner, as by the custom set out in the 1st plea: Held, that all the pleas were bad. The first six and last, because the notice by the ringing of the bell of holding the courts or meetings in those pleas mentioned as there described, was not a reasonable notice of the courts or meetings, or of the purposes for which they were holden, and was therefore insufficient, and the 7th because it did not state that the *Monday's* court was always holden for the purpose of election; and notice of the intended election was not stated as a part of the custom, which was therefore unreasonable. 2ndly, because the defendant did not, in stating his election, bring himself within the custom.

Replication to the 7th plea, that the burgesses met and assembled at the said court as in the 7th plea mentioned, were not in due manner met and assembled for the election of burgesses.

General demurrer and joinder, semble, that this replication was good.

(a) The judges of this court sat, as upon former occasions, on *Monday* the 27th of *June* and the following days, until *Saturday* the 2d of *July* inclusive, and on *Monday* the 31st of *October*, until *Saturday* the 5th of *November* inclusive.

On the 31st of *October*, the 1st, 2nd and 5th of *November*, the Lord Chief Justice sat with the other judges. On the other days three only of the judges attended. During that period this and the following cases were argued and determined.

time

time immemorial been a body corporate, and that there hath during all that time been an indefinite number of burgesses. And that for all the said time a certain court from time to time hath been holden, and ought, &c. in and for the said town and borough (amongst other things) for the election of burgesses of the said town and borough, and *that notice of holding the said Court, for all the time aforesaid, hath been given and ought, &c. by the ringing of a certain bell within the said town and borough.* And that the burgesses for the time being, or so many of them as have been willing and had a mind to be present, and to attend at the said court so holden as aforesaid, have had a right to be present and attend, and ought to have been present and attended, and have been present and attended at the said court so holden as aforesaid. And that during all the time aforesaid, the burgesses of the said town and borough for the time being, or so many of them as were willing and had a mind to be present, being present and attending at the said court so holden, in and for the said town and borough according to the custom of the said court, or the major part of them so present and attending, have elected and chosen, and during all the time last aforesaid, have been used and accustomed to elect and choose, and ought to have elected and chosen at their discretion, such person or persons as they the said burgesses, or so many of them, &c. so present and attending, have thought fit, to the office or offices of a burgess or burgesses of the said town and borough. That before the time of exhibiting the information *notice was given, according to the said custom, by ringing the said bell, of holding the said Court on, &c.,* and that the Court was holden before, &c., and the defendant

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was there elected burgess. 2d plea. That by letters patent bearing date 30th of *June*, 3 *Ed.* 6., that king did grant to the burgesses of the said town and borough of *Monmouth*, and residents within the said town and borough, their heirs, &c. (amongst other things) that they might have amongst themselves a commonalty, and might elect annually one mayor and two bailiffs, &c. (and have various other privileges, set forth in the plea), which said letters patent the burgesses of the said town and borough afterwards, to wit, on, &c. accepted; and the same thence hitherto have been and still are the governing charter of the said town and borough. That from thence hitherto the lawful mode of electing burgesses of and for the said town and borough hath been and still is as follows; that is to say, that the mayor, bailiffs, and burgesses of the town and borough of *Monmouth* aforesaid for the time being, or the mayor and one bailiff, and so many of the burgesses of the said town and borough for the time being, being willing and having a mind to be present, being met and assembled for that purpose, at a certain Court holden in and for the said town and borough, before the mayor and bailiffs, or the mayor and one of the bailiffs for the time being of the said town and borough, according to the custom of the said Court, or the major part of them so assembled and present (*notice having been given of holding such Court by the ringing of a certain bell within the town and borough aforesaid*) have elected and chosen, and, during the whole time last aforesaid, have been used and accustomed to elect and choose, at their discretion, such person or persons as they the said mayor, bailiffs, and burgesses of the said town and borough, or the said mayor, bailiff or bailiffs, and so many

many of the said burgesses being willing and having a mind to be present, so assembled as last aforesaid, or the major part of them so assembled and present, have thought fit, to the office or offices of a burgess or burgesses of the said town and borough. That before the time of exhibiting the said information, to wit, on the said 24th day of *July* 1820 aforesaid, *C. H.*, then the mayor of the said town and borough, and *H. H.* and *H. S.*, then being bailiffs of the said town and borough, and such of the then burgesses of the said town and borough as were willing and had a mind to be present, in due manner met and assembled together, according to the usage and custom of the said town and borough, at the said Court then holden at the Guildhall, in and for the said town and borough, before the said *C. H.*, mayor, and the said *H. H.* and *H. S.*, bailiffs of the said town and borough, according to the custom of the said Court, for the election of burgesses of the said town and borough (*notice having been given of holding such Court by the ringing of the said bell within the town and borough aforesaid*), to wit, at the town and borough aforesaid. That the major part of the mayor and burgesses then and there so met and assembled, and then and there present, did in due manner elect and choose the defendant to be a burgess of the said town and borough. The 3d plea recited the letters patent set out in the 2d plea, and then averred, "That the said letters patent contain no grant, power, authority, direction, or provision, touching or concerning the election or swearing in of burgesses of the said town and borough, or the manner in which burgesses of the town and borough should be nominated, elected, appointed, or sworn in. That long before the time of exhibiting the

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the said information, to wit, on the 24th day of *July*, in the said year of our Lord 1820, *C. H.* Esquire then being the mayor of the said town and borough, and *H. H.* and *H. S.* then being bailiffs of the said town and borough, the said mayor and bailiffs and such of the then burgesses of the said town and borough as were willing and had a mind to be present, met and assembled together at a certain Court holden at the Guildhall, in and for the said town and borough, before the said *C. H.* Esquire, mayor, and *H. H.* and *H. S.* bailiffs of the said town and borough, for the election of burgesses of the said town and borough, *notice having been given of holding the said Court by the ringing of a certain bell within the said town and borough*, to wit, at the town and borough aforesaid. That the major part of the said last-mentioned mayor, bailiffs, and burgesses then and there so met and assembled together as aforesaid, and then and there present, did then and there elect and choose the said defendant to be a burgess of the said town and borough. 4th plea. That *Monmouth* is an ancient borough, and that the burgesses have, from time immemorial, been a body corporate, and that during all that time there hath been an indefinite number of burgesses. That within the said town and borough of *Monmouth* there now is, and for all the said time whereof, &c. there hath been a certain ancient and laudable custom there used and approved of, to wit, that the burgesses of the said town and borough of *Monmouth* for the time being, or so many of the burgesses of the said town and borough for the time being, willing and having a mind to be present, being met and assembled for that purpose, at a meeting of the said corporation, at the Guildhall in
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and for the town and borough aforesaid, or the major part of the said burgesses there so assembled and present, have chosen and elected, and during the whole time last aforesaid have been used and accustomed to choose and elect, at their discretion, such person or persons as they the said burgesses of the said town and borough, or so many of the said burgesses being willing and having a mind to be present, so assembled as aforesaid, or the major part of them so assembled and present, have thought fit, to the office or offices of a burgess or burgesses of the said town and borough; and that, during all the time aforesaid, *notice of holding such meeting hath been given, and ought to have been given by ringing a certain bell within the town and borough aforesaid.* That before the time of exhibiting the said information, to wit, on the 24th day of July, in the year of our Lord 1820, at the town and borough aforesaid, such of the then burgesses of the said town and borough as were willing and had a mind to be present, met and assembled together at the Guildhall in and for the said town and borough, before C. H., then the mayor of the said town and borough, and H. H. and H. S. then the bailiffs of the said town and borough, according to the usage and custom of the said town and borough, for the election of burgesses of the said town and borough, to wit, at, &c. That before the said meeting was so assembled, to wit, on the day and year last aforesaid, *notice of the holding of the said meeting was given by the ringing of the said bell within the town and borough aforesaid,* according to the said usage and custom, to wit, at, &c. and that afterwards, to wit, on the day and year last aforesaid, the major part of the said last mentioned burgesses, then and there so met and assembled together

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as aforesaid, and then and there present, did then and there, at such meeting of the said corporation, choose and elect the said defendant to be a burghess of the said town and borough. The 5th plea varied from the second only by stating the mode of election to have been by the burgesses, "met and assembled for that purpose, at the Guildhall," instead of "at a certain court holden," &c. The 6th plea varied in like manner from the 3d. The 7th plea alleged, that *Monmouth* was an ancient borough, and the burgesses a corporation from time immemorial; and that there always hath been an indefinite number of them; and that within the said town and borough of *Monmouth*, there now is, and for all the time whereof the memory of man is not to the contrary, there hath been an ancient and laudable custom there, used and approved of, to wit, that a certain court hath been holden in and for the said town and borough, before the said mayor and bailiffs, or the mayor and one of the bailiffs of the said town and borough for the time being, on every Monday throughout the year; and that the burgesses of the said town and borough for the time being, or so many of the burgesses of the said town and borough for the time being as have been willing, and had a mind to be present, and to attend during all the time aforesaid, have had a right to be present and to attend; and have been present and attended at the said court; and that the burgesses of the town and borough of *Monmouth* aforesaid for the time being, or so many of the burgesses of the said town and borough for the time being, being willing, and having a mind to be present, *being met and assembled for that purpose* at the said court, so holden in and for the said town and borough, according to the custom of the said court, or the major
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part of them, so assembled and present, have elected and chosen, and, during the whole time last aforesaid, have been used and accustomed, &c. to elect and choose at their discretion, such person or persons as they, the said burgesses of the said town and borough, or so many of the said burgesses being willing and having a mind to be present, so assembled as aforesaid, or the major part of them so assembled and present have thought fit, to the office or offices of a burgess or burgesses of the said town and borough. That before the time of exhibiting the said information, to wit, on the 24th day of *July*, in the year of our Lord 1820, the same day being on a Monday, the said Court was holden before C. H., Esq., then the mayor of the said town and borough; and H. H. and H. S. then being bailiffs of the said town and borough, according to the usage and custom of the said town and borough, in the Guildhall, in and for the said town and borough, according to the custom of the said Court, for the election of burgesses of the said town and borough, to wit, at, &c.; and that the major part of the burgesses *then and there so met and assembled together as aforesaid*, and then and there present elected the defendant to be burgess. The 8th plea referred to the letters patent, as set out in the 5th plea, averred that they contained no provision touching the election of burgesses, and then proceeded; "That afterwards, to wit, on Monday next, after the feast of Saint Michael, the archangel, in the 5th year of the reign of the late King Edward the 6th, the then mayor, bailiffs, and burgesses of the said town and borough did in due manner meet and assemble themselves together in the Guildhall in and for the said town and borough; and did then and there, for the good government of the said town and borough, and for

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for the due and convenient election of burgesses of and for the said town and borough, make, constitute, and ordain a good, wholesome, and reasonable bye-law, (not now extant in writing) whereby it was ordered, resolved, and provided, that, in all time to come, notice of a meeting of the mayor, bailiffs, and burgesses of the said town and borough, for the electing of burgesses of and for the said town and borough, should be given by the ringing of a certain bell within the said town and borough; and that, after such notice the mayor, bailiffs, and burgesses, or the mayor and one of the bailiffs, and so many of the burgesses as, upon the ringing of the said bell, should be willing and minded to be present, should meet and assemble themselves together in the Guildhall of and for the said town and borough, for the election of burgesses of and for the said town and borough; and that the said mayor, bailiffs, and burgesses, or the mayor, bailiff, or bailiffs, and burgesses, or the major part of them so met and assembled together, should, at their discretion, elect and choose such person and persons as they should think fit to be a burgess or burgesses of the said town and borough, to wit, at &c.; which said bye-law still remains in full force and effect, not repealed, revoked, or altered, to wit, at &c." That the defendant was elected in pursuance of the bye-law. To these pleas there were 49 general replications, taking issue upon the various allegations in the pleas. The 1st special replication to the 1st plea alleged, That the said bell, in the first plea mentioned, was and is a certain bell in the Guildhall of the said town and borough. That the liberties of the said town and borough, in divers directions, were and are to a great extent, to wit, to the extent of divers, to wit, three miles from the Guildhall

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of the said town and borough. That divers, to wit, 20 of the burgesses of the said town and borough reside and dwell out of the said town of *Monmouth*, and within the liberties of the said town and borough, at a great distance, to wit, the distance of three miles from the Guildhall of the said town and borough. That the said bell, and the ringing thereof, could not be heard at all times throughout the whole liberties of the said town and borough, so as to give notice to all the burgesses residing and dwelling therein. That the notice of holding the said Court by ringing the said bell, in the said first plea mentioned, was not given to, nor could the ringing of the said bell be heard by divers, to wit, 20 burgesses residing and being within the liberties of the said town and borough, who were willing and would have had a mind to be present and attend at the said Court so holden, as in the said first plea mentioned, whereat the said defendant was so elected and chosen as aforesaid, to wit, at, &c., and this, &c. The 2d special replication described in the same manner the situation of the bell, the extent of the liberties, and the residence of various burgesses out of the town and within the liberties, and then averred, that the said bell, in the first plea mentioned, was not rung in proper and sufficient time, before the holding of the said Court, in that plea mentioned, to give due notice of holding the said Court at the said time in that plea mentioned, to all the burgesses residing and being within the liberties of the said town and borough, who had a right to be present and attend at the said Court so holden, as in the 1st plea mentioned, whereat the defendant was so elected and chosen as aforesaid. The 3d special replication alleged, that the notice given of holding the said Court in the 1st plea mentioned, by ringing the said bell

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bell in that plea mentioned, was not a due and sufficient notice in that behalf. The same special replications were pleaded to the 2d, 3d, 4th, 5th, 6th, and 8th pleas. To the 7th, there were special replications: 1st., that the said Court, in the 7th plea mentioned, was and is a Court, which the burgesses of the said town and borough are not bound to attend as burgesses, and hath been used and accustomed to be holden for other business than such as relates to the electing and choosing of burgesses; and that due and sufficient notice was not given of the Court, in the 7th plea mentioned being about to be holden for the purpose of electing and choosing burgesses. 2diy, that the burgesses so met and assembled together at the said Court, on &c. as in the 7th plea mentioned, were not in due manner met and assembled together for the electing and choosing of burgesses. Defendant rejoined to the second special replication to the first plea, "that notice was given, according to the said custom in that plea mentioned, by ringing the said bell, of holding the said Court, in and for the said town and borough in manner and form as defendant in the said first plea alleged," and concluded to the country. To the same replication to the 2d and 3d pleas, "that the said bell, in that plea mentioned, was in due manner rung to give notice of holding the said Court in those pleas mentioned." To the same replication to the 4th plea, "that notice was given, according to the custom in that plea mentioned, by ringing the said bell, of holding the said meeting so holden as in that plea mentioned, whereat the said defendant was so elected and chosen as aforesaid." To the same replication to the 5th and 6th pleas, "that the said bell was in due manner rung to give notice of holding the said meeting and assembly." To the 1st special replication to the 7th plea, "that the said Court in that plea mentioned was,

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and is, a court which the burgesses of the said town and borough are bound to attend as burgesses." To the 2d special replication to the 8th plea, "that notice of the said meeting for the election of burgesses, in that plea mentioned, was given, according to the form and effect of the bye law in that plea mentioned, by ringing the said bell therein mentioned." General demurrer to the 1st and 3d special replications to the 1st, 2d, 3d, 4th, 5th, 6th, and 8th pleas, and to the 2d special replication to the 7th plea. Demurrer to the 1st rejoinder assigning for causes that the defendant hath not denied or traversed any matter in the replication, nor confessed, nor avoided, nor in any manner answered the same, and for that the defendant hath pleaded new matter in his said rejoinder, to wit, that notice was given according to the said custom in the first plea mentioned, by ringing the said bell, of holding the said court, and yet hath concluded to the country. Demurrer to the other rejoinders for the like causes.

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Campbell in support of the demurrer to the replications. The information in this case does not mention the liberties of the borough of *Monmouth*. The 1st plea states, that *Monmouth* is an ancient borough, that the burgesses are a corporation by prescription, that their number is indefinite, and a custom to elect burgesses at a court, of the holding whereof notice has been immemorially given by the ringing of a bell. The first special replication introduces the liberties of the borough, and states that divers burgesses resided out of the town and within the liberties, and that they could not hear the bell. That replication, therefore, admits that the bell could be heard throughout the town and borough, and the

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question is, whether that be or be not a sufficient notice. Personal summons is necessary for the meeting of a select body, but not where the body is indefinite, and a majority of the persons composing it are not required to be present. Neither is a member of a select body entitled to a summons, if he be not resident within the borough; *Rex v. Grimes*. (a) So also where a select body are to meet, and do some particular act, notice must be given to each member, and if the meeting be not on a charter day, notice of the particular business to be transacted must also be given, *Rex v. Mayor, &c. of Carlisle* (b), *Rex v. Mayor, &c. of Liverpool* (c), *Rex v. Mayor, &c. of Doncaster* (d), *Musgrove v. Nevinston* (e); but that may be dispensed with, if every member of the select body is present, and concurring in the proceeding, *Rex v. Theodorick* (f), unless the charter requires a previous summons. In the present case, the election was to be made by an indefinite body, and, therefore, all those which have been cited, are inapplicable; the usual and immemorial notice of meeting was given, and even, if it could not be heard all over the borough, still it would be the proper notice, and personal summons would not have been a sufficient substitute for it, *Rex v. May*, and *Rex v. Little*. (g) (*Bayley J.* The plea does not state how long the bell was to ring, nor how long a time was to elapse between the ringing of the bell and the proceeding to an election.) The relator might have replied, that the bell had not been rung according to the immemorial usage, or that there was not a sufficient interval between the

(a) *Burr.* 2598.(b) 1 *Str.* 385.(c) 2 *Burr.* 723.(d) *Id.* 738.(e) 2 *Ld. Raym.* 1358.(f) 8 *East*, 543.(g) 5 *Burr.* 2681.

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ringing and the election. No doubt the King might by charter say that such a notice of meeting should be given, and a charter is to be presumed in favor of an immemorial usage. The notice, therefore, is at all events good. It is, however, admitted by the pleadings that the bell is heard all over the borough, although not throughout the liberties. Now the court will presume, that *Monmouth* was anciently a walled town, and that all the burgage tenements were within the borough, and if so the liberties are no part of the borough, *Litt. b. 2. c. 10. s. 162.* A liberty is a franchise, created by the crown, and may be for any purpose that the King pleases, in general it is for juridical purposes only. The King may extend the jurisdiction of borough justices, it may be given to them in a distinct county, but that surely would not make it a part of the borough, *Long's case (a), Blankley v. Winstanley (b).* The grant of such a liberty would not then alter an immemorial custom of giving notice of corporate assemblies. If that be so, the first special replication is bad, for it allows the bell to be a sufficient notice within the borough itself. The next replication merely says, that the bell was not rung a sufficient time to give notice to all the burgesses resident within the liberties, but if it was not necessary that it should be heard there, that replication also is bad. The third special replication is still worse, it merely avers that the notice in the plea mentioned was not a due and sufficient notice; that is a traverse of matter of law, and amounts to a demurrer, it is, therefore, bad, *Rex v. Portreeve of Honiton (c).* (*Bayley J.* In the first plea it is stated, that the court was holden, amongst other things, for the

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(a) 5 Co. 121.

(a) *Setw. N. P.* 1086.

(b) 3 T. R. 279.

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election of burgesses, and that notice of holding the court was given by the ringing of the bell; it is not stated that the bell gave notice of holding the court *for the election of burgesses*, and this objection applies also to the 2d and 3d pleas.) The 4th and 5th pleas do not mention the court, but state a custom for the burgesses met and assembled *for that purpose* to elect, and that notice of such assembly has always been given by ringing the bell. Then the 7th plea states, that a court has been immemorially holden every *Monday*, and that the burgesses had a right to attend, and that those met and assembled there for that purpose have immemorially elected burgesses. (*Bayley J.* You do not allege, that the court has been holden for the purposes of election, but that the burgesses assembled there for the purpose of electing have elected. Neither is it stated, that the defendant was elected by burgesses *assembled for that purpose*. *Little-dale J.* The plea amounts to this, that at the *Monday's* court burgesses may be elected without any notice.) The burgesses are assembled at that court for all purposes which may be lawfully executed. It is in the nature of a charter-day, when elections may take place without notice. This mode of proceeding is made legal by the custom. (*Holroyd J.* Can there without notice be a legal meeting?) The 8th plea is free from all these objections. It alleges a bye-law to regulate the election of burgesses, directing that notice of meetings for elections shall be given by ringing a bell, and that those assembled after the notice shall have power to elect. It then avers the giving of the notice, the assembling of the corporation for the purpose of electing, and the election of the defendant as a burgess. The replications to that plea

plea are bad for the reasons already given ; upon that plea, therefore, it is clear that judgment must be given for the defendant.

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G. R. Cross contra was stopped by the Court.

BAYLEY J. It is unnecessary to enter into any consideration of the replications in this case, because I think that all the defendant's pleas are bad in law. Where the election of burgesses is fixed, either by charter or custom, to take place on any specific day, there it is the duty of every person, entitled to vote, to take notice, that there is to be an election on that day. But when no specific day is fixed, and the election may take place at a meeting holden at any time, it is essential, that notice of the meeting and of the business to be transacted there should be given to all persons resident within the limits of the borough who are entitled to vote, and that should be a reasonable notice, and at a reasonable time before the election actually takes place. It appears to me, that the notice given as stated on these pleas, by ringing a bell, (which may be rung for other purposes,) that the corporation will immediately proceed to the election of burgesses, is not a reasonable notice. The defendant relies, in some of his pleas, on an immemorial custom, in others on an usage which has prevailed since the grant of a charter by *Ed. 6.* The 1st plea is on the custom, and states, that a Court has been *from time to time* holden, amongst other things, for the election of burgesses ; and that notice has been given by ringing the bell. It does not state on what particular days the Court is to be holden, nor that burgesses are to be elected at every Court, nor that the bell gave notice that an election was about to take place. The custom

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is also silent as to the length of time during which the bell must ring, and the interval which must elapse between the ringing of the bell and the conclusion of the election. It is possible that some of the burgesses who reside within the borough and hear the bell, may not be able to get to the place of meeting before the conclusion of the election. Such a custom might be made subservient to very fraudulent practices; I am therefore of opinion, that it is not a reasonable custom. The voters should be apprised that an election is about to take place, and there should be such an interval between the notice and election, as would give them an opportunity of being present. Even if personal notice were given, requiring immediate attendance, I should think it insufficient, a fortiori, the notice mentioned in plea must be so. The second plea sets out a charter granted by Ed. 6.; and alleges, that from the time of the charter the burgesses met and assembled for that purpose, at a Court holden before the mayor and bailiffs, (notice having been given of holding such Court by the ringing of a certain bell), have elected such persons to be burgesses as they have thought fit. Still the day is left indefinite and no burgesses can be legally assembled for the purpose of an election, unless notice of the purposes of the meeting has been given to each burgess residing within the limits of the borough, or unless all the electors are present and consenting. Besides all the objections to the notice stated in the 1st plea, are equally applicable to this and to the 3d and 4th pleas. The 5th was relied on in argument, but that varies from the 2d merely by describing the election as taking place "at a meeting and assembly at the Guildhall, instead of "at a court." The notice is said to be of such meeting and assembly, but it does

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not state whether the notice was of the time of meeting or of the purposes for which it was holden. The 6th plea varies in like manner from the 3d, and is therefore already disposed of. The 7th plea is framed upon a custom; I made some observations upon it during the argument, and am of opinion that the plea is bad on two grounds; 1st, that the custom is bad in law; 2d, that the defendant does not bring himself within the custom. The custom states that there has been a Monday's court, and that the burgesses being present, and having met and assembled there for that purpose have elected. If they all had notice, there might be a good meeting, but they must meet for the purpose of electing; and in all cases where a day is fixed for an election (not being a charter day), notice of the meeting and of the purpose for which it is holden must be given. Now, the 7th plea does not shew that the Monday's court was by custom holden *for the purpose of election*, or that giving notice was any part of the custom; it is therefore bad. Again in stating his election, the defendant says, that the Court was holden for the purpose of election, and does not state that the burgesses were met and assembled for that purpose; he does not, therefore, bring himself within the custom. Even if that plea were good, the replication would, I think, be a sufficient answer. It states that the burgesses were not in due manner assembled for the purpose of electing. If the words "in due manner" had been omitted, the replication would clearly have been good, and I think that they mean nothing more than the law would imply. The bye-law set out in the eighth plea is open to the same objections as the custom in the first. That plea is therefore bad, as well as the other seven; and our judgment must consequently be for the crown.

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HOLBOYD J. I entirely agree with my brother *Bayley* in thinking all the defendant's pleas bad. The bell may or may not be notice of the election. It is not alleged in any one plea, that the bell gives notice of the purposes of the meeting, for which it is rung, nor does it appear that there is any limitation as to the hour of ringing, nor to the duration of it, nor is it said at whose order the bell is to be rung. I apprehend that the proper mode of pleading would have been to state, that a Court had been immemorially holden for the election of burgesses, and that by immemorial usage the burgesses duly assembled had been accustomed to elect. Then would have followed averments that the Court was duly holden, and that the burgesses duly assembled did elect, so that issue might have been taken on one or more of those facts. If the defendant attempts in pleading to fritter away those facts by stating a variety of circumstances, he must, at least, allege such circumstances as are tantamount to those facts: therefore, when he states that notice was given by ringing a bell, he should shew that it was a reasonable notice, otherwise it does not dispense with the allegations that the Court was duly holden, and the burgesses duly assembled. Again, if you seek to vary the common law by a custom, you must bring yourself strictly within the custom, which the defendant has not done by his seventh plea.

LITTLEDALE J. I also think the pleas bad. Where a meeting is holden on a charter-day, it is not necessary to give notice of it; but at any other time notice of a meeting, and of the purposes for which it is holden, must be given. The first plea does not confine the custom to a court for the purpose of election; notice of the particular business to be transacted was, therefore,
necessary,

necessary, and consequently, notice by the bell was insufficient. But if the election had been the only business, still the notice would be bad, for the reasons given by my learned brothers. The same objection applies to all the pleas till the seventh. To that it is a sufficient answer that the defendant has not brought himself within the custom. As to the eighth, it is clear that a bye-law cannot make that good which, as a custom, is illegal.

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Judgment for the crown.

JONES *against* COWLEY.

ASSUMPSIT in consideration that the plaintiff, at the request of the defendant had bought a horse of him, the defendant undertook that it was sound. Plea non assumpsit. At the trial before *Littledale J.* at the last spring assizes, for the county of *Hereford*, it appeared that at the time of the sale, the horse had the appearance of having received a kick on one leg; but that it had not then produced lameness, and the defendant warranted that the horse was sound every where, except the kick on the leg. It was proved, that the horse was in other respects unsound, having a dropsy at the time of the sale. It was objected by the defendant's counsel, that the evidence did not support the declaration, inasmuch as the warranty declared upon was general, and the warranty proved was qualified. The learned judge was of this opinion, and was about to nonsuit the plaintiff, but his counsel cited the case of *Garment v. Barrs.* (a) There the plaintiff declared upon

Declaration in assumpsit stated that the defendant warranted a horse to be sound, the proof was that the defendant warranted the horse to be sound everywhere except a kick on the leg: Held, that this was a qualified, and not a general warranty, and that there was a variance between the warranty proved and that stated in the declaration.

(a) 2 *Esp. N. P. C.* 673.

a general

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JONES
against
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might not turn out to be an unsoundness, and that the defendant said to the plaintiff, "I will warrant against any unsoundness, except against an unsoundness which may result from the kick on the leg." It appears to me that that was a qualified warranty. I cannot, indeed, distinguish this case from *Garment v. Barrs (a)*; but I am not satisfied with the reasoning of Lord Chief Justice Eyre in that case. He there lays it down, that in order to make it a variance, the injury the horse had sustained ought to be of a permanent nature, and not such as arose from a temporary accident. If that reasoning be correct, it will depend in many cases upon a subsequent event, viz. whether the injury be permanent, whether the contract amount to a general or qualified warranty; but that question must depend upon the intention of the parties at the time when the contract was made. Suppose it had turned out that the horse had a permanent unsoundness arising from the kick on the leg, the defendant clearly would not have been liable on the warranty given by him. But if he had given a general warranty he would have been liable. The contracts are substantially different. The rule for entering a nonsuit must, therefore, be made absolute.

HOLROYD J. I am of opinion that the general warranty was not proved. Whether it was proved or not, must depend not on the subsequent event, but on what passed between the parties at the time when the contract was completed.

LITTLEDALE J. concurred.

Rule absolute.

(a) 2 *Esp. N. P. C.* 673.

1825.

FAULKNER, Clerk, *against* ELGER & NEWBY.

THIS was an action for a false return to a writ of mandamus. Declaration stated, that the defendants were the churchwardens of the parish of *St. Sepulchre*, in the town of *Cambridge*; and that the curacy of the parish church of the said parish, was a perpetual curacy, within the diocese of, &c., endowed, &c., and that, from the time of such endowment of the said curacy, there had been, and still was, within the said parish *a custom, that when, and so often as it had happened, that the said perpetual curacy had been or should be vacant, by reason of the death of the perpetual curate thereof, or otherwise, the parishioners of the parish had been used and accustomed to elect, and, ought to elect a fit and proper person, in holy orders, according to the rites, &c., to be the perpetual curate thereof for the time being; which said person so elected as aforesaid, the churchwardens and parishioners of the said parish, during all that time, had been used and accustomed to nominate; and, of right, ought to nominate to the bishop, in order that he might be duly licensed to the curacy.* The declaration then stated, that, on the 24th day of *November* 1823, at, &c., a vacancy having occurred in the said perpetual

vote. In consequence of this resolution, several persons who had the legal right of voting did not tender their votes, and the votes of others who did tender their votes, were rejected, on the ground that they had not paid the church-rate: Held, that a party elected by the majority of the persons whose votes were received at this meeting was not duly elected by the parishioners according to the custom.

At the election every parishioner tendering a vote gave a card containing only the name of the candidate for whom he voted; semble, that this mode of election was illegal.

curacy,

1825.

FAULKNER
against
ELDER.

CASES IN TRINITY TERM

curacy, by the resignation of the perpetual curate thereof, an election was had and made by the said parishioners of the said parish, pursuant to the said custom; and, thereupon, plaintiff being a person having taken holy orders, according, &c., was to wit, on, &c., at, &c., duly, and according to the custom of the said parish, elected by the parishioners of the said parish, to be the perpetual curate; and, thereupon, it became the duty of the defendants, so being such churchwardens as aforesaid, to summon a meeting of the parishioners of the parish, in order that the plaintiff might, by the defendants, and the parishioners, be nominated to the bishop, for licence to the perpetual curacy; that, after the plaintiff had been so elected, he applied to the defendants, as churchwardens, and requested them to summon a meeting of the parishioners of the parish, for the purpose of nominating the plaintiff as aforesaid, yet, that defendants refused to summon such meeting for that purpose; and, thereupon, the plaintiff, on the 31st May 1824, obtained from the Court of K. B. writ of mandamus (which was set out in the declaration) commanding them to do so without delay, and that the defendants being churchwardens, failed and maliciously returned, that the plaintiff was duly, and according to the custom of the said parish, elected to the said perpetual curacy, in manner, form, &c.; by reason whereof, the plaintiff has been deprived of the said curacy, and of the profit and advantages thereof, &c. At the trial before G. at the last spring assizes for the county of C. it appeared, by an entry in the church and

book, dated *November 24, 1823*, that, at a meeting of the parishioners for the election of a minister, according to notice given in the church for that purpose, the major part of the parishioners present had elected the Rev. *H. Robinson*; the number being for *Robinson* 36, for the plaintiff 34. It was proved, that *C. Nainby*, a householder, who paid poor-rates, had actually voted for the plaintiff; but being afterwards desired by the chairman to withdraw his vote, on the ground that he had no right to vote, not having paid church-rates, he withdrew one of the cards on which the plaintiff's name was written. *Duckins, Harbone, Robert Everett*, and *Wells*, four other householders who paid poor-rates, did not actually tender their votes, but went to the church for that purpose; and were deterred from tendering them, because they were informed that they were not entitled to vote, on the ground that they had not paid church-rates. It was admitted, on the other hand, that a person of the name of *Herring*, who voted for the plaintiff, had no right to vote. It appeared, further, that the mode of election was by the party intending to vote giving in a card, containing the name of one of the candidates, but not the name of the voter. On the part of the defendants, it was proved, by a Mr. *Abbott*, who presided at the meeting, that, before the election began, it was decided, that the votes of persons who had not paid church-rates should not be received. It was also proved, that one *James Everett*, a householder, who had intended to vote for *Robinson*, was refused, on the ground that he had not paid church-rates; and that *Flack*, the parish clerk, went to the church to offer his vote, but did not, in fact, tender it, in consequence
of

1825.

PAULENER
against
ELDER.

1895.

PAULFNER
against
Edgewood.

of being told that he had no vote, because he did not pay church-rates. The learned judge expressed some doubt whether the voters, whose names were then proposed to be added to the poll, could, in point of law, be considered as having tendered their votes, inasmuch as they acquiesced in the objection, by not insisting that they had a right to vote; but he left it to the jury to find, whether the right of election was in the parishioners, as alleged in the declaration; and for whom the voters, whose votes had been inquired into at the trial, intended to vote. The jury found the custom to elect for the plaintiff, as alleged in the declaration; and they found for the plaintiff as to the votes of *Nainby, Duckins, Wells, Harbone*, and *Robert Everett*, for the defendant, as to the vote of *James Everett*; consequently, the plaintiff having 38 votes, after deducting that of *Herring*, and *Robinson* only 37, the verdict was entered generally for the plaintiff. A rule nisi for a new trial was obtained in *Easter* term last, upon two grounds, first, that the mode of election by ballot was illegal; and, secondly, that the votes added at the trial had not been duly tendered.

Storks and *Dover* now shewed cause. Election by ballot is a legal mode of election. The custom alleged in the declaration is general; and the jury have found that by the custom, no particular mode of election is specified. The Court will therefore put such a construction on the act of the parishioners, ut res magis valeat quam pereat. The custom being for the parishioners to elect, it was competent to them to adopt any reasonable mode of election. Now election by ballot is

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a reasonable, and, therefore, a legal regulation. The clergyman not knowing who votes for or against him, will come into the parish with equal goodwill to all. It does not contravene the general law. It is quite clear that a majority of the parishioners are competent to make regulations to bind the whole. In *Stoughton v. Reynolds* (a), the right of adjourning a vestry was held to be in a parish at large, and in 16 *Viner's* Abr. tit. Parishioners (A), pl. 5., there is the following passage: "Parishioners are a body politic to many purposes; as to vote at vestry if they pay *scot and lot*; they have a sole right to raise taxes for their own relief, without the interposition of any superior court; may make *bye laws* to mend the highways, and to make banks to keep out the sea, and for repairing the church, and making a bridge, &c., or any such thing for the public good; and by 3 & 4 W. 3., and 7 Anne, to tax and levy poor-rates, and to make and maintain fire engines; and by 9 G. 1. c. 7. s. 4. for purchasing workhouses for the poor." Then the exclusion of persons from voting who had not paid the church-rate was illegal. It is true that there is a power incident to every body to make regulations binding on themselves, if they be not contrary to law. But by the 58 G. 3. c. 69. s. 4. all persons are entitled to vote at vestries who pay poor-rates. The restriction in this case was therefore contrary to law, and there is no pretence for saying that it formed part of the custom. Then as to the mode of voting where the election is by polling; there it is the duty of the voter to tender his vote for a particular person, and to see that his tender is recorded in the poll-book. Here there is no book, the object being that the voter should not be known; therefore, no such tender could be made.

1826.

 FAULKNER
 against
 BLISS.

(a) 2 Str. 1045.

1825.

FAULKNER
against
RIGGS.

CASES IN TRINITY TERM

Robinson, contra. The mode of election pursued in this case was illegal. It is the duty of the returning officer to return as duly elected that person who is elected by the majority of those who have the legal right of voting. Now if the voter is permitted to give in a paper containing the name of the candidate for whom he votes, without the addition of his own name, it becomes impossible, in the event of a scrutiny, for the returning officer to strike off the votes of those who had not the right of voting. He, therefore, puts it out of his power by this mode of election, to return with certainty the person who was duly elected. Besides, if such a mode of election by ballot, or by presenting a card, were legal; in this case, some of the persons who intended to vote did not go into the room, and *Rex v. Ellis (a)* is an authority to shew; that without personal presence, such intention, however frustrated, will not constitute a vote. This is always necessary. But assuming that the mode of election was legal, the plaintiff has not made out that he was duly elected according to custom. The custom as alleged is, that the parishioners in general are to elect. Now the plaintiff has made out that he was elected by a majority of parishioners, but only by a majority of those parishioners who had paid the church-rates. He was stopped by the Court.

BAYLEY J. The right of election is thus stated in declaration, that there was a custom within that when the perpetual curacy was vacant of the death of the curate, or otherwise parishioners should elect a fit person. The p

(a) 17 St. Trials, 822.

is brought for a false return to a mandamus, by which the defendants have certified that the plaintiff was not duly and according to the custom of the parish elected. Now if the votes were equal there was no election. It appears that before the election began, it was decided that the votes of persons who had not paid the church-rates should not be received. That appears to me not to have been a legal resolution. If, however, it was a good and legal rule, then *Mr. Robinson* had the majority of the votes. If it was an illegal resolution; as it is impossible to say how many persons may have kept away on the supposition that it was to be a settled rule, I think the election is void. I am disposed to think that an election under such a rule could not be good without the consent of all the electors. But taking the right of election to be in the parishioners at large, to whom no such disqualification applied, the question is whether the mode of election pursued in this case was legal. It is not necessary to give a decided opinion upon that point, but I incline to think that it was not legal. I do not mean to apply my observation to a case where each person inserts his name in a book, but to that species of election where the voter gives his vote in such a manner that no person but himself can know for whom he voted. The common law mode of election is by shew of hands, or by poll, and the party electing is then said to have a voice in the election. The objection to the mode of voting by ballot is, that it presents an insurmountable difficulty to a scrutiny, because no person can tell for whom a particular individual voted. Another objection to election by ballot is, that the taking of votes in this secret and private manner has a tendency

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 FAULKNER
 against
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CASES IN TRINITY TERM

gency to encourage perjury. Suppose the numbers equal, and one man has tendered his vote, which has been refused, he will carry the election, according as he says he would have voted, one way or the other. I do not mean to express a decided opinion upon this point, but I incline to think, for these reasons, that this is not a legal mode of election. Independently of this, the plaintiff has not made out that he had the majority of legal votes. It appears by the learned Judge's report, that upon the finding of the jury, the plaintiff must be taken to have had thirty-eight votes, including that of *Robert Everitt*, and *Mr. Robinson* thirty-seven; but it further appeared that *Flack*, the parish-clerk, went up to offer his vote, and was told that he had no vote, because he paid no church-rates; but it is left in dubio for whom he intended to vote. Suppose, therefore, that before *Flack* came to vote the plaintiff had a majority of votes, who can say that the numbers are not equal now, it being left in doubt whether *Flack* meant to vote for the plaintiff or for *Robinson*? If he intended to vote for *Robinson*, then the numbers would be equal. It lay upon the plaintiff to shew that he had the majority of votes. Now as *Flack* had a right to vote, and perhaps intended to vote for *Robinson*, the plaintiff has failed making out that he had the majority of votes.

HOLROYD J. The question upon this record may be taken to be, whether the plaintiff was duly elected according to the custom in the parish, as stated on the record. The custom is, that the parishioners are to elect a fit and proper person to be the perpetual curate thereof for the time being; and it is alleged in the declaration that the plaintiff was elected acc

that custom. I am of opinion that he was not elected according to that custom, because upon the evidence it appears that he was elected by those parishioners only who paid the church-rates. He has not, therefore, made out in proof the allegation in the declaration, that he was duly elected according to the custom, because he has not shewn that he was elected by the parishioners in general. I think it was not competent to the parishioners to narrow the custom by passing a bye-law which would have the effect of making it depend on the will of particular persons whether a person had a right to vote or not. I have great doubt, also, whether election by ballot be a legal mode of election or not. Some advantage may accrue from it, such as avoiding ill will amongst the parishioners, and leaving the voters uninfluenced; but I think that it is the duty of the returning officer to see that the person returned is duly elected, and that he is bound to use reasonable means to attain that end. Now if he takes down the names of the voters, and the persons for whom they vote, and it afterwards appears that any person has been admitted to vote who has no right to vote, his name may, on a scrutiny, be struck off. In the case of an election by ballot, the returning officer puts it out of his power to ascertain whether the party who voted had a right to vote or not. But it is not necessary to decide that point; it is sufficient to say, that the plaintiff was not elected by the parishioners in general, but only by those paying the church-rate. I think, also, for the reasons stated by my Brother Bayley, that the plaintiff did not make out that he had the majority of votes.

1825.

FAULKNER
against
Blacks.

LITLEDALE J. The custom, as alleged in the de-
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against
ELOER.

claration, is, that the parishioners should elect; all parishioners, therefore, had a right to elect; but it was decided at the meeting that no persons who had not paid the church rate should vote. Now, it is possible that no church-rate may have been made for many years before, and, therefore, that a party may not have paid the rate, because there was none to be paid; but I think that the parishioners, at the time of meeting for the purpose of electing, had no right to restrict the number of electors. Corporators have the right to make reasonable bye-laws, even to restrict the number of electors; but that must be done at a corporate meeting, convened for the purpose, and of which reasonable notice must be given. I will not say whether the parishioners had a right in this case, if they had given due notice of their intention, to make it a rule that no person who had not paid the church rate should have a right to vote. I am clearly of opinion that they had no right to do it on the spur of the occasion. As to the other question, it is clear that at common law, where parties have the right of voting, the restriction of voting by ballot cannot be imposed. The writing of the name of the candidate on a card is not strictly an election by ballot. The great objection to such a mode of election is, that there can be no effectual scrutiny, because if it be afterwards discovered that a given individual has voted who had no right to vote, it is impossible to say on which side he voted. I think that the mode of election adopted in this case was illegal. But it is unnecessary to decide that point. It is sufficient to say, that the plaintiff has not made out that he was elected by the parishioners. That being so, I think the rule for a new trial must be made absolute.

Rule absolute.

1825.

The KING *against* the INHABITANTS OF
HAMBLEDON.

UPON an appeal against an order of two magistrates, for the removal of *John Birdseye* from the township of *Witney*, in the county of *Oxford*, to the parish of *Hambledon*, in the county of *Surrey*; the sessions confirmed the order, subject to the opinion of this Court on the following case. In the year 1786, the parishes of *Brumley*, *Chiddingfold*, *Dunsfold*, and *Hambledon*, were incorporated under the provisions of the act 22 G. 3. c. 83. The parishes of *Haselmere*, *Shalford*, *Saint Martha*, *Hascomb*, and *Elstead*, afterwards took the benefit of the same provision; and all the parishes before mentioned became incorporated and united parishes, under and for the purposes of the act. About the year 1787, a very large house of industry was erected by contribution of all the said parishes upon the waste of the manor, in the parish of *Hambledon*, as the most convenient situation for the purposes of the incorporation. To this house, paupers from all the united parishes were sent by these parishes respectively, as occasion required, and were maintained separately, at the expence of the respective parishes to which the paupers severally belonged. For the management of this general house of industry, and the employment of all the classes of paupers therein, a governor was from time to time appointed, under the powers of the act. In the year 1820, *John Birdseye*, who had gained a settlement at *Witney* in *Oxfordshire*, before the date of the said act, was appointed governor of the house of industry, by an order in the

Where eight parishes were incorporated and had a common workhouse, under the 22 G. 3. c. 83. and a person was appointed by one of those parishes governor of the poor of that parish for one year, and served for three years under that appointment, residing in the workhouse: Held, that no one parish singly had power to appoint a governor of its poor, and that the pauper did not, by serving under that appointment gain a settlement.

Semble that if he had been appointed by all the parishes he would not have gained a settlement, sec. 39. of the 22 G. 3. c. 83., providing "that nothing in the act contained shall alter or affect the settlement of any person or persons whomsoever."

1822:
 The King
 against
 The Inhabitants
 of HAMBLETON.

following form. “ *Surrey sessions.* We, two of his Majesty’s Justices of the peace for the county of *Surrey*, acting for the hundred of *Godalming*, in the said county, do hereby appoint *John Birdseye of Hambledon*, to execute the office of governor of the poor, for the parish of *Hambledon*, within the said hundred, for one year, to be computed from the week of *Easter* now last past, to which he has been recommended at a public meeting, holden the 29th day of *March* last, pursuant to the directions of the act passed in the 22 G. 3. for the better relief and employment of the poor. Given under our hands and seals this 6th day of *April* 1822, G. W. O., J. M.” Under this appointment, he served in the said office of governor for three years in succession, upon the same terms; and, during that time, resided in the parish of *Hambledon*. The questions for the consideration of the Court are, whether *John Birdseye* was duly appointed to a public annual office, according to the provisions of the statute; and whether, by his service in such office in the parish of *Hambledon*, he gained a settlement there.

G. R. Cross, in support of the order of sessions. The first question in this case is, whether the office held by the pauper was a public annual office, within the 3 & 4 W. 3. c. 11. s. 6. Now, the appointment was made, by virtue of the 22 G. 3. c. 83. s. 9., and that calls it an office; it was public, as being the office of governor of a work-house, and it was annual, by the very terms of the appointment. It will be objected, that by the terms of the appointment it appears to have been for less than a year, for it is for a year, to be computed from a day past. But it is also stated, that the pauper served for three years upon the same terms, which must mean the same

same terms of payment and remuneration. It was a continuous service under the original appointment.

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Another objection will be founded on section 39. of the 22 G. 3. c. 83., by which it was enacted, "that nothing

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therein contained should extend or be construed to extend, to alter or affect the settlement of any person or persons whomsoever, or to give any illegitimate child, who might be born in any poor-house or work-house, established under the authority of that act, a settlement in the parish or place in which such work-house or poor-house should be situated, but every such child should be considered as settled in the parish or place to which the mother belonged." But that provision applies only to paupers in the work-house, not to servants there or to officers. This is plain, from the provision respecting illegitimate children, and also from the corresponding enactment in the 9 G. 1. c. 7. s. 4. "Provided always, that no poor person or persons, his, her, or their apprentice, child, or children, shall acquire a settlement in the parish, town, or place, to which he, she, or they, are removed, by virtue of this act." Taking the whole together, it seems clear, that the clause in the 22 G. 3. c. 83. was to apply to those persons only who were brought into the parish compulsorily, under the provisions of the act.

Nolan contra. The pauper was not properly appointed. The appointment should have been for the eight incorporated parishes; and not for one of them alone. (He was then stopped by the Court.)

BAYLEY J. The appointment for one parish was clearly insufficient; and, on the other point also, it appears

1825.

The King
against
The Inhabitants
of HAMBLETON.

appears to me, that no settlement was gained in *Hambleton*. It was decided in *Rex v. Mersham* (a), that the master of a work-house is not a public officer, unless he be made so by act of parliament; and, therefore, before the 22 G. 3. c. 83. no settlement could have been gained by service under such an appointment. That statute calls it an office, but the 39th section says, that all persons in the work-house are to be in the same situation, with respect to settlements, as if the act had not passed. For both these reasons, therefore, it appears to me, that the order of sessions must be quashed.

HOLROYD and LITTLEDALE Js. concurred.

Order of sessions quashed.

(a) 7 East, 167.

WOODCOCK *against* GIBSON and OTHERS.

The 59 G. 3.
c. 12. & 17.
vests in the
churchwardens
and overseers
of the poor, in
the nature of a
body corporate
all buildings,
lands, and here-
ditaments be-
longing to the
parish: Held,
that in order to
constitute the
body corporate
intended by the
act, there must
be two over-
seers, and a
churchwarden
or church-
wardens, and that where there were two overseers appointed, one of whom was afterwards appointed (by custom) sole churchwarden, the act did not vest parish property in them.

TRESPASS for breaking and entering a close, called the garden, in the parish of *Thorp*, and destroying vegetables, &c. Plea 1st not guilty; 2d that the close was the soil and freehold of *Gibson* and one *Joseph Taylor*, then being the sole churchwarden of the parish of *Thorp*; 3d that it was the soil and freehold of *Gibson* and the said *Joseph Taylor*, as and then being the overseers of the poor, and the said *J. Taylor* then being the sole churchwarden of the said parish. Replication to each that it was the close of plaintiff, and not of *Gibson* and *Taylor* in manner alleged. At the trial before *Best C. J.*, at the *Lincoln* Summer Assizes 1824, the

trespass

trespass was proved, and for the defendants it was shewn, that the locus in quo was parish property, and that *Gibson* and *Taylor* were appointed overseers of the poor, on the 5th of *April* 1823, and on the 22d of the same month, *Taylor* was appointed sole churchwarden, it being the custom of the parish to have one only; and it was then contended that the locus in quo vested in them by the operation of the 59 G. 3. c. 12. s. 17. (a) The Chief Justice was of that opinion, but directed the jury to assess the damages on the 2d and 3d issues to save expence, if this Court should be of opinion that the close was not the soil and freehold of *Gibson* and *Taylor*, and the jury assessed the damages at one penny. A rule nisi for entering a verdict for the plaintiff on those issues having been obtained in *Michaelmas* term,

1825.

Woodcock
against
Gibson.

Phillipps now shewed cause. The only question to be considered is, whether the evidence given at the trial supported the second or third plea. Now it appeared that the appointment of *Gibson* and *Taylor*, as overseers, preceded the appointment of *Taylor* as churchwarden. The property would by the 59 G. 3. c. 12. s. 17. immediately vest in them as overseers, and it is immaterial to consider whether *Taylor* was afterwards legally

(a) By which it is enacted, "that all buildings, lands, and hereditaments which shall be purchased, hired, or taken on lease by the churchwardens and overseers of the poor of any parish, by the authority and for any of the purposes of this act, shall be conveyed, &c. to the churchwardens and overseers of the poor of every such parish respectively, and their successors in trust for the parish; and such churchwardens and overseers of the poor and their successors, shall and may, and they are hereby empowered to accept, take, and hold in the nature of a body corporate for and on behalf of the parish, all such buildings, lands, and hereditaments, and all other buildings, lands, and hereditaments belonging to such parish."

appointed

1825.

Woodcock
against
Gibson.

appointed churchwarden. [Bayley J. Would it not vest in them and the then churchwardens?] The evidence did not shew that there was at that time a churchwarden. Now if the property vested in *Gibson* and *Taylor*, as overseers, the 2d plea was proved, and that is an answer to the action. It was objected at the trial, that these persons were not overseers within the meaning of the statute, because one of them was also appointed churchwarden, and *The King v. All Saints, Derby (a)*, was cited. But that only decided that as the statute 43 Eliz. c. 2. requires apprentices to be bound, "by the churchwardens and overseers, or the major part of them," there must be two overseers besides the churchwardens, in order to execute the powers given by the act. Those are mere naked powers, and to be strictly pursued. The question here is quite different, and is simply, whether the property did not vest in *Gibson* and *Taylor* immediately on their appointment as overseers; and if so, there was nothing to divest it afterwards.

Clarke and *N. R. Clarke* contra. The 59 G. 3. c. 12. s. 17. gives the property to the churchwardens and overseers as a corporation. *Gibson* and *Taylor* were not at the time of the trespass, nor had they ever constituted a corporation of churchwardens and overseers, the property, therefore, never vested in them. *The King v. All Saints, Derby*, expressly decided that there must be two overseers, distinct from the churchwardens, in order to comply with the requisites of the 43 Eliz. c. 2.

BAYLEY J. The 17th section of the 59 G. 3. c. 12. certainly vests the property in the churchwardens and

(a) 13 East, 143.

overseers as a body politic; and, therefore, until officers of both descriptions are appointed, nothing vests in either of them. Now *Gibson* and *Taylor* were appointed overseers on the 5th of *April*; if there were at that time a churchwarden, the property might vest in him and the overseers; but that does not appear, nor is there a plea to that effect. *Taylor* was afterwards appointed churchwarden, but neither before that appointment nor afterwards, could he and *Gibson*, by themselves, constitute a corporation of churchwardens and overseers. The property, therefore, would not vest in them, so as to support the pleas of soil and freehold, and the rule for entering a verdict for the plaintiff must be made absolute.

1825.

WOODCOCK
against
GIBSON.

Rule absolute.

COTTERILL *against* HOBBY.

THE declaration stated, that at the time of the grievances complained of, a certain close, situate, &c., was in the possession and occupation of one *H. C. Morgan*, as tenant thereof to the plaintiff, the reversion then and still belonging to the plaintiff, and that the defendant cut down a quantity of branches off and from certain trees then standing and growing in and upon the said close; second count trover for timber. Plea, the general issue. At the trial before *Garrow B.* at the last *Leint* assises for *Hereford*, *Morgan* was called as a witness for the plaintiff, and proved that he was tenant to the plain-

Case for an injury done to plaintiff's reversionary interest in land, by cutting and carrying away branches of trees growing there. 2d count in trover for the wood carried away. It appeared in evidence that the land was let by the plaintiff to the occupier under a written agreement:

Held, that in order to support the 1st count the plaintiff was bound to produce it.

The plaintiff proved that the defendant carried away some branches of the trees, but gave no evidence of the value: Held, that he was entitled to nominal damages on the count in trover.

tiff

1825.

COTTEWILL
against
HOBBS.

tiff of the close in question, under a written agreement, that defendant lopped some branches off the trees growing there, and carried them away. No evidence of the value was given. For the defendant, it was objected that the agreement under which *Morgan* held should have been produced, for that it could not otherwise appear that the plaintiff was reversioner of the trees. The learned Judge refused to nonsuit the plaintiff, and the jury returned a general verdict with 5*l.* damages. In *Easter* term *Campbell* obtained a rule nisi for entering a nonsuit against which

Taunton and *Oldnall Russell* now shewed cause. *Morgan* proved the fact of his being tenant of the close in question, under the plaintiff. In the absence of any proof to the contrary, it must be presumed that the trees were demised together with the close. If they were excepted, it was for the defendant to prove it, *Doe v. Morris*. (a) At all events the objection does not apply to the count in trover; that, therefore, is sufficient to sustain the verdict.

Campbell and *Maule* contra. No reliance was placed upon that count at the trial, nor was any evidence given to guide the jury in giving damages. The verdict cannot, therefore, be applied to that count. With respect to the other, it was proved that *Morgan* held the close under a written agreement, and unless that was produced there could be no legal evidence that the plaintiff was reversioner. If the trees were excepted out of the demise, the action should have been trespass and not case.

(a) 12 *East*, 237.

BAYLEY J. It having been shewn that *Morgan* held under a written agreement, I am of opinion that the terms of the holding could only be proved by that instrument, and, consequently, that the verdict on the first count cannot be sustained. But the objection does not apply to the count in trover. The trees were equally the property of the plaintiff, whether they were or were not excepted out of the demise; and it having been proved that the defendant carried away some of the branches, I think that the plaintiff is entitled to nominal damages, although no proof of the value was given.

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COTTERILL
against
HONEY.

HOLROYD and LITLEDALÉ Js. concurred.

Rule discharged, the verdict being reduced to 1s.

The KING *against* BOLDERO, Clerk.

UPON an appeal against a poor rate for the parish of *Calton cum Willingham*, in the county of *Cambridge*, the sessions confirmed the rate, subject to the opinion of this Court, upon the following case:— Previous to the year 1799, the rector of the parish of *Calton cum Willingham* was, in right of his said rectory, entitled to the tithes of corn, grain, hay, and all other great and small tithes arising within that parish; but in that year an act of parliament was passed for “dividing, allotting, and enclosing the open and common fields,

Where an inclosure act enacted that the tithes of a certain parish should be extinguished, and that in lieu of them the commissioners should award to the rector a certain annual rent, equal in value to a certain portion of the lands in the parish, to be paid by the

owners of those lands in such proportions as the commissioners should award: Held, that the rector was liable to be rated to the poor in respect of this rent or annual payment, the act not having expressly exempted it from that burthen.

commons,

1825.

JOHN RUSSELL
against
HENRY.

CASES IN TRINITY TERM

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1825.

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commons,

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against
Bolton.

commons, waste, and other commonable lands and grounds in the parish of *Calton cum Willingham*, in the county of *Cambridge*, and for extinguishing the tithes in the said parish;" and in the act was the following clause:— "And whereas it is proposed and agreed that all tithes whatsoever arising within the parish of *Calton cum Willingham* aforesaid, and payable to the rector of the said parish, shall cease and be for ever extinguished, and that, in lieu thereof, certain yearly rents or sums of money shall be ascertained and paid to the rector of the said parish for the time being, in manner hereinafter mentioned; be it therefore further enacted, that the said commissioners shall ascertain and determine the annual value of all the lands and grounds within the said parish of *Calton cum Willingham*, subject or liable to the payment of tithes in kind to the said rector, and also what yearly sum of lawful money of *Great Britain* will, according to the valuation aforesaid, be equivalent to one fifth part of all the arable lands, one twelfth part of all the wood lands, and one ninth part of all the other lands and grounds in the said parish which are severally subject and liable to the payment of tithes in kind to the said rector; and the said commissioners shall also ascertain and determine, according to the proportions aforesaid, the several parts or proportions of the said yearly sum to be charged upon each of the several estates of the respective proprietors, as a yearly rent, payable thereout respectively to the said rector and his successors, in lieu of the tithes thereof; and the same shall be and are hereby charged thereon accordingly." The act then provided, that in case the said yearly rents or sums should be in arrear, it should be lawful for the rector and his successors to have and exercise

exercise such or the like powers and remedies for recovering the same, and the costs and charges incurred by the non-payment thereof, as by the laws and statutes of this realm are provided and given for the recovery of rent reserved on any lease or demise, or other rents in arrear. It was also enacted, that from and after the commencement of the several yearly rents therein before directed to be ascertained and paid to the rector and his successors in lieu of tithes as aforesaid, all tithes, both great and small, and all payments in lieu of tithes appertaining to the said rectory, and arising and payable upon, out of, or for all and every or any of the lands and tenements within the parish of *Calton cum Willingham*, should cease, determine, and be for ever extinguished (*Easter offerings, mortuaries, and surplice fees only excepted*). The commissioners were also to ascertain the average price of a bushel of wheat for twenty-one years then last past; and at the expiration of fourteen years from the making of the award, either the parishioners or the rector might insist upon having a new average taken; and the yearly rents or payments to him in lieu of tithes were to be increased or diminished, in proportion to the difference between the price of wheat upon the average so taken and that originally taken by the commissioners. The commissioners having ascertained the several matters required by the act, awarded a certain annual payment to the rector, in pursuance of the act, and then awarded, that from a day preceding the date of the award, "all and all manner of tithes, both great and small, arising, growing, and renewing, as well out of or from all the lands or grounds by the said act intended to be divided, allotted, and inclosed, and exonerated from tithes, as out of all the homesteads, homecloses

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against
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and all other lands and grounds within the said parish, should cease and determine, and be for ever extinguished." In *April* 1824, the rector, *W. Boldero*, was rated to the poor in respect of the annual payment to him by virtue of the award, which in the rate was described as "corn-rent as composition for tithes." The question for the opinion of this Court was, whether the rector was liable to be rated in respect of that composition?

Nolan, in support of the order of the sessions, was stopped by the Court.

Marryat contra. If tithes are let for a term of years, the rector or vicar is not rateable in respect of them; and here it may be said, that as no variation in the settlement can be made until the expiration of fourteen years from the date of the award, the tithes have, at all events, been let for that period. The rector in this case has not received tithes, but rents issuing out of the lands in lieu of tithes. It has been held that the clerk is rateable where the tenant is allowed to retain his tithes; but when they are let, the owner can no more be rated for them than a landlord in respect of the rent of a farm. Under this act the money received by the rector is not for tithes, but is a *rent*, and is so called in fact, and the rector has not the choice of receiving tithes if he pleases; they are necessarily retained by the occupier of the land. The case is very similar to *Chatfield v. Rushton* (a), where the parson was held to be rateable. *Lowndes v. Horne* (b) proceeded

(a) 3 B. & C. 863.

(b) 2 W. Bl. 1252.

ground that the payment to the parson was not a rent. [*Littledale J.* It does not follow, because it is called a rent, that all the legal attributes of rents attach. You must look to the substance of the thing.] The mode in which the amount of payment is to be ascertained shews that it ought to be exempt from the burthen sought to be imposed. The commissioners are to ascertain what yearly sum will be equivalent to a certain portion of the lands in the parish, and to award that to the rector. Now, according to *Rex v. Hull Dock Company (a)*, the value of the land is the rent it will bring, after paying the poor-rate, so that the amount of the poor-rate would be deducted from the value of the part awarded to the rector. To hold that he is rateable, would, therefore, be to make him, in effect, pay the rate twice over.

BAYLEY J. It is perfectly clear that tithes are rateable to the poor; but this question arises upon an act passed in the 39 G. 3., extinguishing tithes in the parish of *Calton*, and securing to the rector a certain annual payment in lieu of them. Before that time, *Lowndes v. Horne*, *Rex v. Toms (b)*, and *Rann v. Picking (c)*, had been determined, from which cases this principle may be collected; that if, under an inclosure act, a sum of money is given to the rector or vicar, in lieu of tithes which were rateable, that money will also be rateable, unless the liability is taken away by express words in the statute. It appears to me that, in the present case, the money payment is liable to the same burthens as the tithes for which it was substituted. It is, indeed, called a *rent*, but, in fact, is nothing more than a sum of money

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(a) 3 B. & C. 516.

(b) Doug. 401.

(c) Cald. 196.

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Boswell.**

paid annually in lieu of tithes, and is not to have all the attributes of a rent, although the act gives the same mode of recovering it. Then it has been urged, that in valuing the land the poor-rate would be deducted, and therefore the rector would, on that account, get a smaller sum, and ought not to be rated in respect of it. But there is a fallacy in that: for, before the statute, the land was charged with a poor-rate, payable both by the occupier and the tithe owner; and in the calculation by the commissioners, that part only which was payable by the occupier would be deducted; and unless the money in the hands of the rector were liable in the same manner as the tithes, a loss would be sustained by the parish. For these reasons, I think that the rate was a good one, and was properly confirmed.

HOLROYD J. I think that the sessions were right in confirming this rate. It is clear, as a general proposition, that not only tithes, but also compensations in lieu of them, are rateable. But it has been argued that we ought, in this case, to consider the tenants of the lands as occupiers of the tithes on a prospective bargain. They cannot, however, be so considered; for by the act and the award the tithes are extinguished. The compensation is expressly stated to be in lieu of the tithes themselves, and there are no words exempting it from this burthen. I think, therefore that it was rateable. It is true, that rent of land paid to a landlord is exempt; but it by no means follows that this payment is rent, although it is called so, and a distress given for recovery of it.

LITTLE J

LITLEDALE J. It appears to me that this money was rateable. The statute 43 *Eliz. c. 2.* makes a parson liable in respect of the profits which he receives *as parson*; and I think that he is equally liable in respect of a corn-rent paid by way of composition, as in respect of tithes themselves, the act of parliament not containing any express exemption. The payment is not strictly a rent, although in common parlance it may be so called. Many things are commonly called corn-rents which are not so in reality. It is paid to the rector in lieu of the tithes which are extinguished, but the ability of the rector is not diminished by that extinguishment, and it has been shown by my brother *Bayley* that the question is not affected by the mode in which the value of the land would be calculated.

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Order of sessions confirmed.

FLINT, Gent. one, &c. *against* PIKE, &c.

DECLARATION stated, that before the publishing of the libel thereafter mentioned, the plaintiff was an attorney, and had been retained, to bring and prosecute a certain writ and plea of waste in the Court of C. P., in which *Thomas Redfern* and others were plaintiffs; and *Sarah Smith* was defendant. It then set out the declaration in waste and the plea, that the defendant had not made any waste; and that issue having been joined on the plea, it came on to be tried at the *Derbyshire*

In an action for a libel which purported to be a report of a trial, the defendant pleaded that the supposed libel was in substance a true account and report of the trial: Held, upon demurrer, that this plea was bad.

Semble that although it be

lawful for a counsel in the discharge of his duty to utter matter injurious to individuals, yet the subsequent publication of such slanderous matter is not justifiable, unless it be shewn that it was published for the purpose of giving the public information which it was fit and proper for them to receive, and that it was warranted by the evidence.

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assizes 1823 ; and that the jury found that the said *Sarah Smith* had not made any waste. The declaration then stated, that the defendant, well knowing the premises, &c., but contriving, &c., maliciously published of and concerning the plaintiff, the libel, &c., which purported to be a report of the said trial. The libel professed to give a short summary of the facts of the case ; and then stated, that *A. B.* was counsel for the plaintiffs ; and that *C. D.* was counsel for the defendant ; and that the latter was both extremely severe and amusing, at the expence of Mr. *Flint*, the plaintiffs' attorney. It then professed to give a few outlines of the speech of the counsel for the defendant, and the part of the speech set out contained some very severe reflections on the conduct of the present plaintiff, with respect to his having brought the action of waste, and having advised that form of action with a view to his own profit. But the evidence given at the trial was not set out. Plea, that the supposed libel was, in substance, a true report of the trial of the said issue. Demurrer and joinder.

Manning, in support of the demurrer. The plea is bad, because it states that the libel contains a true account of the trial *in substance*. A party is not at liberty to publish the result of evidence, *Lewis v. Walter* (a), *Duncan v. Thwaites*. (b) Neither can he justify publishing what, in his judgment, may be the substance of a trial. But assuming the plea to be good, in point of form, it is no answer to this action. It is true, that an action will not lie for slander spoken, either by a party or a counsel, in the course of a judicial proceeding.

(a) 4 B. & A. 605.

(b) 3 B. & C. 556.

Brook v. Montague (a), *Hodgson v. Scarlett* (b); but the reason why a counsel acting in discharge of his duty, is privileged when he utters even slanderous matter is, that experience has proved it to be for the advantage of the administration of justice, that counsel so acting should have unlimited freedom of speech. That reason does not apply to any subsequent publication of that slanderous matter, and therefore that is not privileged. Slanderous matter, however injurious to an individual, uttered by a member of parliament, in parliament, is not actionable or indictable; because it is for the public advantage that members of parliament should have unlimited freedom of speech. But the subsequent publication of the slanderous matter, although originally uttered in parliament, has been held to be criminal, *Rex v. Crewey* (c), *Rex v. Lord Abingdon*. (d) Upon the same principle, the subsequent publication of slander, uttered by a counsel in the course of a judicial proceeding, is wrongful, and, therefore, actionable. Supposing such a plea as this not to be bad in itself, and, under all circumstances, as tending to too vague an issue; still, in the present case, it is repugnant to the libel itself, which, upon this part of the record, the defendant admits that he has published. For it is evident, upon reading the libel, that the paragraph could not be, in substance, a true account of the trial.

N. R. Clarke, contra. As to the form of the plea. The allegation that the libel is, *in substance*, a true report of the trial is equivalent to an allegation, that it is a *true*

(a) *Cro. Jac.* 90, 1 *Rolle's Abr.*

87. (M) *pl.* 1.

(b) 1 *B. & A.* 232.

(c) 1 *M. & S.* 275.

(d) 1 *Exp.* 226.

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report, for if it had been stated that it was a true report, it would have been sufficient to have proved it true *in substance*. In *Weaver v. Lloyd (a)*, one of the pleas, to a declaration upon a libel was, that the matters contained in it were true "*in substance and effect*;" and the Court held, that this must mean that *each particular* of the charge contained in the libel was true in substance; requiring, therefore, as strict proof as they would have done if the plea had been that the matters contained in the libel were true. Then, as to the other point, *Curry v. Walter (b)*, is an authority to shew, that an action cannot be maintained for publishing a true account of the speech made by a counsel, in applying for a criminal information, although the publication be injurious to an individual; and the reason why the publication of the proceedings in courts of justice, though injurious to individuals is lawful, is, that the general advantage to the country in having these proceedings made public, more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings. (c) [*Bayley J.* Assuming it to be lawful to give a history of a trial, does it therefore follow that it is lawful to publish every part of it which is injurious to an individual? Is not a party bound to abstain from publishing that part which is injurious to individuals?] It may be a very nice question, whether a particular matter be so injurious to an individual as to make the subsequent publication of that matter, libellous or not; and the editors of newspapers cannot be competent to form a correct judgment upon such

(a) 2 B. & C. 678.

(c) *Re v. Wright*, 8 T. R. 295.

(b) 1 Bos. & Pul. 525.

a subject.

a subject. To hold, therefore, that they must abstain from publishing any part of the proceedings of a court of justice, which contains slanderous matter, would have the effect of preventing the publication of such proceedings altogether: besides, there are many cases where strong observations on the conduct of a witness are properly made by counsel, in the course of a cause. A correct report of the proceedings in such a trial cannot be given without giving those observations. It is important to the public to know, not only the verdict in a cause, but the ground upon which such verdict proceeded, and, in many instances, that verdict may have depended upon the credit given by the jury to a particular witness. It may, therefore, be fit, that the public should be informed of the observations made by counsel, on the testimony of that witness. [*Holroyd J.* No facts are stated in the plea to shew that the observations of counsel were warranted.] It is not a true report, if any thing is contained in it which did not pass at the trial, or if any thing is *suppressed*, which would in any respect have qualified that part which reflects upon the conduct of the plaintiff; but otherwise it is a true report, as far as respects this case, although it may not state every thing which was said upon the trial. The observations here made upon the plaintiff, are in respect of his having resorted to an antiquated form of action, and it sufficiently appears from the report, that such was the form of action. If any evidence, or other matter omitted in the report would have shewn these observations to have been unfounded, then it is not a true report, and the plaintiff should have taken issue upon the plea. It can never be essential to the truth

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truth of a report, that every unimportant matter should be stated; otherwise the pleadings, &c., must be set out at length.

BAYLEY J. It may be, and I think, is extremely beneficial that the public, should be apprized of many things which occur in courts of justice, and of a great variety of the cases which there undergo discussion. The publication of such cases is lawful, because it is useful to the public, but it does not thence follow that any person is at liberty to publish every thing which occurs in courts of justice, or that he is at liberty to publish not only the whole, but even part of a trial when that part is libellous on an individual. The libel in question purports to set forth a speech of counsel for the defendant, containing many severe observations on the conduct of the attorney for the plaintiff in the cause. If the evidence had been stated in the libel, the reader of it might have formed his own judgment, how far the observations were well founded. The question is, whether the defendant without detailing the evidence was at liberty to issue to the world this speech of counsel which contained matter injurious to the present plaintiff. The speech of a counsel is privileged by the occasion on which it is spoken; he is at liberty to make strong, even calumnious observations against the party, the witnesses and the attorney in the cause. The law presumes that he acts in discharge of his duty, and in pursuance of his instructions, and allows him this privilege, because it is for the advantage of the administration of justice, that he should have free liberty of speech. But, although for the purpose of the administration of justice, a counsel has that privilege, it does not follow that all persons may afterwards publish

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in a newspaper the observations made by him in the course of a cause which are injurious to individuals. Those observations are made in the hearing of numerous auditors, and of the jury, and for the purpose of influencing the latter in their decision. The auditors and the jury have an opportunity of judging how far such observations are warranted by the evidence, but here the publisher of this libel gives his readers no such opportunity. There are cases in which the slanderous matter has been justified by the occasion on which it was uttered and the subsequent publication of that matter has been held to be actionable, or indictable, *Rex v. Creery*. (a) *Rex v. Lord Abingdon*. (b) There the defendants were held to be liable criminally for publishing in a newspaper speeches which they had uttered in parliament, and that is not a new doctrine, for in the case of *Lake v. King* (c), a petition presented to a committee of parliament was ordered by the House of Commons to be printed *for the use of the members*, but it was published elsewhere, and such publication was held to be unjustifiable, because it went beyond that which the privilege of parliament required. So it seems to me, that the subsequent publication of a speech made by a counsel in the course of a cause containing observations injurious to the character of a party, attorney or witness in the cause, is not lawful, because such publication is not required for the due administration of justice. It is said that it will be a hardship on the proprietors of newspapers, to hold that it is not lawful to publish the speeches of counsel in all cases, inasmuch as they, the proprietors, are not competent to form a judgment as to what is libellous, and what not;

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 against
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(a) 1 M. & S. 273.

(b) 1 Esp. 226.

(c) 1 Saund. 120.

but

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but they ought not to publish any thing, if they are not competent to judge, whether it be injurious to an individual or not. My opinion is, that a party is at liberty to publish a history of the trial, viz. of the facts of the case, and of the law of the case as applied to those facts, but that he is not at liberty to publish observations made by counsel injurious to the character of individuals. It was not necessary for the purposes of this cause to go so far as I have done, yet as that, after much consideration, is my opinion, I think it right to declare it. It seems to me that, although the counsel was privileged to speak the matter alleged in this libel, no other person was privileged to publish that matter, and on that ground I think the plea is bad.

HOLROYD J. I think that the plea which states that the libel is *in substance* a true report and account of the trial, is not a sufficient justification. Notwithstanding the facts disclosed in the plea, it may be perfectly true, that the publication may have been made from the malicious motives alleged in the declaration. Then there is no denial in the plea that the libel was published with such motives, nor are there any circumstances or facts stated to shew to the court that this publication was for the purpose of giving such information to the public, as it was proper or requisite they should have. With a view to the due administration of justice, counsel are privileged in what they say. Unless the administration of justice is to be fettered, they must have free liberty of speech in making their observations, which it must be remembered may be answered by the opposing counsel, and commented on by the Judge, and are afterwards taken into consideration by the jury, who have an opportunity
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of judging how far the matter uttered by the counsel is warranted by the facts proved. Therefore, in the course of the administration of justice, counsel have a special privilege of uttering matter even injurious to an individual, on the ground that such a privilege tends to the better administration of justice. And if a counsel in the course of a cause utter observations injurious to individuals, and not relevant to the matter in issue, it seems to me that he would not, therefore, be responsible to the party injured in a common action for slander; but, that it would be necessary to sue him in a special action on the case in which it must be alleged in the declaration and proved at the trial, that the matter was spoken maliciously and without reasonable and probable cause. This may be illustrated by the common case of a false charge of felony exhibited before a justice of the peace, therean action upon the case, as for defamation, will not lie, because the slander is uttered in the course of the administration of justice; but the party complaining is bound to allege that it was made without reasonable or probable cause. It by no means follows, however, because a counsel is privileged when, in the course of the administration of justice, he utters slanderous matter, that a third person may repeat that slanderous matter to all the world. The repeating of such slander is not done in the course of the administration of justice, and therefore is not privileged. In *Lake v. King* (a) the reprinting of a correct copy of a petition to the House of Commons, which had been printed for the use of the members, was held to be illegal. *Rex v. Creevey* (b), and *Rex v. Lord Abingdon* (c), are also in point to shew that, al-

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against
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(a) 1 Saund. 120. (b) 1 M. & S. 273. (c) 1 Esp. 226.

though

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though the slanderous matter uttered may be privileged by the occasion on which it is spoken, the subsequent publication of that matter may be criminal. Besides, this plea only states that the report was true *in substance*. I think that is not sufficient; it ought to have stated some facts to shew that it was true in substance; and then it would be for the Court to judge whether it was true *in substance* or not. But I am of opinion that a person is not justified in publishing throughout the kingdom calumnious observations which a counsel in a cause may think it his duty to make. If this plea had proceeded to state any thing to shew that it was material and necessary that the public should be made acquainted, not only with the facts of the case, but with the observations made on them, and had shewn that those observations were warranted, and that the plaintiff deserved the imputation thrown on him, the plea might have been good; but that would have been a very different plea from the present. I think, therefore, that the plea is defective in point of law, and that there must be judgment for the plaintiff.

LITLEDALE J. I think that this plea, which states that the libel was *in substance* a true and accurate report of the trial, is not sufficient. By *substance*, I apprehend, is meant the inference which the person who published the libel draws from the whole of what passed at the trial. The plea, therefore, amounts to this, that the libel, in his judgment, is a true account and report of the trial. Now, in my judgment, it appears upon the face of the declaration that the libel does not contain a true and accurate report of the trial, because it neither details the speech of the counsel for the plaintiff nor the evidence, nor
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even the whole of the speech of the counsel for the defendant. But even supposing that this had not appeared on the face of the declaration, and that the libel professed to give the speeches of both counsel and the evidence, still I think that this plea, which states that the libel contained in substance a true and accurate report of the trial, is not good in point of form. In an action for a libel, it is necessary to set out in the declaration the words of the libel itself, in order that the Court may see whether they constitute a good ground of action. In *Wright v. Clement* (a), a declaration stating that the defendant published a libel, containing false and scandalous matter, "in substance as follows," and then setting out the libel with innuendoes, was held to be bad in arrest of judgment, because it professed to give only the general import and effect of the libel, and not a copy of it. For the very same reason, it appears to me that it is not sufficient to state in a plea that the libel is *in substance* a true and accurate report of the trial. I think the plea ought to shew the libel to be a true account and report of the trial. I do not mean to say that it is necessary that the supposed libel should contain every word uttered at the trial, or that unnecessary matter may not be omitted. If issue had been taken on this plea, the jury, in order to decide whether the libel was *in substance* a true report of the trial, would have to consider the relation of all the different parts of the libel to each other, and to say if, upon the whole, it was a fair abstract. Now that would be a most difficult issue to try; but there would be no difficulty if the issue were whether the libel was a true and accurate report of the trial. The question as to the general

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(a) 3 B. & A. 503.

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right of proprietors of newspapers to publish an account of proceedings in courts of justice, does not necessarily arise in this case. If they profess to give an account of the trial, I am of opinion they ought to give a true and accurate report of the trial; so that the Court, when the record comes before them on demurrer, may see whether it was a trial proper to be published; and, on the other hand, if it goes to issue, that the jury may be able to decide if it be a true and accurate report. I think that the only case in which an editor of a newspaper can justify a libel on the ground that it contains an account of a trial, is where he really gives a true and accurate report of it; and even in that case it will be for the Court to consider whether it was lawful to publish it. I am therefore of opinion that this plea is bad, and that there must be judgment for the plaintiff.

Judgment for the plaintiff.

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SCRATTON *against* BROWN.

TRESPASS for breaking and entering three closes of the plaintiff, situate in the parish of *Prittlewell*, in the county of *Essex*, being respectively to the southward of the cliff, and part or parcel of the now beach or shore, and with spades, &c., turning up the soil of the said closes, and taking and carrying away large quantities of shingle and stones, and converting the same to the defendant's use. Plea, not guilty. At the trial before *Graham B.*, at the spring assizes for the county of *Essex*, 1825, it appeared that the plaintiff was tenant for life of an estate at *Southend* and *Prittlewell*, bounded on the south by the sea, and that he was also lord of the manors of *Middleton Hall* and *Prittlewell Priory*. The defendant was a manufacturer of *Parker's* cement, and had, at different times, taken stones, for the purpose of

By lease and release dated in 1773, *A. B.* lord of the manors of *M. H.* and *P. P.* bargained and sold unto *C. D. E. F. & G. H.* "all that messuage, tenement, boat-house, &c., and also all that and those the sea-grounds, oyster-layings, shores, and fisheries of him *A. B.*, commonly called and known by the name and names of *M. H.* and *P. P.* shores or sea-grounds, with full and free liberty to *C. D. E. F.* and *G. H.* and

their heirs and assigns for ever to fish, dredge, and lay oysters thereon, and from thence to take and carry away the same; which said sea-grounds, oyster layings, shores, and fisheries, extended from the south at low-water mark, to the north at high-water mark, and from certain sea-grounds on the east to other sea-grounds on the west. And all which said sea-grounds, oyster-layings, shores, and fisheries thereby granted, released, &c., contained in the whole by estimation 500 acres of land covered with water, or thereabouts, as the same were beaconed, marked, and stubbed out. Reservation to the grantor, his heirs, and assigns, lord of the two manors, of all manner of fish-royal, and all wrecks of the sea, flotsam, jetsam, and ligan within the said manors, and all manner of franchises." And by the tenendum the grantees were to hold the messuage, tenement, and boat-house, sea-grounds, oyster-layings, shores or fisheries, hereditaments and premises, with the appurtenances, of the grantor, lord of the two manors, by such suit of court, and other services as were or of right ought to be done and performed by other the freehold tenants of the same respective manors seised of estates of inheritance in fee: Held, that by this deed the right of soil in the sea-shore passed to the grantees.

It appeared that since the date of the deed the sea had imperceptibly and gradually encroached upon the land, and consequently that the high and low water mark had varied in the same degree. It was held, that by the deed the right of soil in that portion of land which from time to time lay between high and low water mark passed to the grantees.

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making the cement, from the sea-beach and sea-shore adjoining the plaintiff's manors. Some of them had been taken between high and low-water mark, and some had been taken above high-water mark. The plaintiff, in order to shew that the space between high and low-water mark belonged to him, proved that from time to time he had exercised acts of ownership there. The defendant took the stones under the authority of one *Taylor*, in whom was vested an interest in the shore conveyed by the plaintiff by lease and release, bearing date the 27th and 28th September 1773, to *T. Lee*, *D. Harridge*, and *W. King*. The release was made between those persons and *D. Scratton*, the present plaintiff, described as eldest son and heir-at-law of *D. Scratton* deceased. It recited that by lease and release of the 17th and 18th January, 1770, and by a recovery suffered in pursuance thereof, in *Hilary* term, 10 G. 3., the messuage, tenement, or boat-house, sea-grounds, oyster-layings, shores, fisheries, and hereditaments thereafter mentioned, amongst other hereditaments therein comprized, were conveyed and assured, or intended so to be, unto and to the use of the said *D. Scratton* (deceased), his heirs and assigns for ever; and that *D. Scratton* had contracted with *T. Lee*, *D. Harridge*, and *W. King* for the absolute sale to them and their heirs of the said messuage, tenement, boat-house, sea-grounds, oyster-layings, shores, fisheries, and hereditaments, for the sum of 6000*l*. The indenture then witnessed, "that in pursuance of the recited contract, and in consideration of the sum of 6000*l*., paid as therein mentioned, which was agreed to be the full consideration-money for the absolute purchase of the messuage, tenement, or boat-house, sea-grounds, oyster-layings, shores, fisheries, and premises, he the said

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D. Scrutton had bargained, sold, released, &c., unto the said *T. Lee*, *D. Harridge*, and *W. King*, in their actual possession then being, by virtue of a bargain and sale made to them, the day next before the date of the release, for one year, and to their heirs and assigns, all that messuage, tenement, or boat-house, with the gardens, stables, outhouses, and buildings thereunto belonging, situate at a place called *Southend*, in the parish of *Prittlewell* aforesaid; and also all that and those sea-grounds, oyster-layings, shores, and fisheries of him the said *D. Scrutton*, commonly called by the name or names of *Milton*, otherwise *Middleton Hall* and *Prittlewell Priory* shores or sea-grounds, or by the name of one of them, or by whatever name or names the same were or had been theretofore called or known, situate, lying, and being in the parish of *Prittlewell* aforesaid, or in some other parish or parishes thereunto next or near adjoining, with full and free liberty to and for the said *T. Lee*, *D. Harridge*, and *W. King*, and their heirs and assigns for ever, to fish, dredge, and lay oysters thereon, and from thence to take and carry away the same, at their and every of their free wills and pleasures; which said sea-grounds, oyster-layings, shores, and fisheries did extend from the south, at low-water mark, to the north at high-water mark, and abutted west, towards *Leigh* aforesaid, upon the lands or sea-grounds of *E. Tyrrel*, Esquire, called *Chalkwell Hall*, and towards the east upon the sea or oyster-grounds of *Thomas Drex*, Esquire, in the said county of *Essex*; and all which said sea-grounds, oyster-layings, shores, and fisheries thereby granted, released, and conveyed and mentioned, or intended so to be, did contain in the whole, by estimation, 800 acres of land covered with water, or thereabouts, as the same were

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beaconed, marked, and stubbed out, and were then in the tenure or occupation of the said *T. Lee*, *D. Harridge*, and *W. King*, their under-tenants or assigns, together with all and all manner of ways, &c. (saving, except, and reserving unto the said *D. Scratton*, his heirs and assigns, lord or lords of the respective manors of *Prittlewell Priory* and *Milton*, otherwise *Middleton Hall*, out of the grant and conveyance thereby made, all and all manner of fish-royal, and all wrecks of the sea, flotsam, jetsam, and ligan, within the said respective manors, or either of them; and also all and all manner of franchises, royalties, jurisdictions, perquisites, and profits of courts, and all other manorial rights and privileges whatsoever to him the said *D. Scratton*, as lord of the said manors, or either of them, belonging or appertaining, as fully and amply as the same were then used, exercised, and enjoyed by him in respect of other the freehold tenants of the said respective manors seised of estates of inheritance in fee simple); and the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits of all and singular the said premises, and of every part and parcel thereof, and all the estate, &c.; to hold the said messuage, tenement, or boat-house, sea-grounds, oyster-layings, shores, and fisheries, hereditaments and premises thereby granted or released, or intended so to be, and every part and parcel thereof, with their and every of their rights, members, privileges, hereditaments, and appurtenances, unto the said *T. Lee*, *D. Harridge*, and *W. King*, their heirs and assigns, as to one full undivided third part of all and singular the said hereditaments and premises, to the only proper use and behoof of the said *T. Lee*, his heirs and assigns for ever; and as to one other full undivided
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third part of all and singular the said hereditaments and premises, to the only proper use and behoof of the said *D. Harridge*, his heirs and assigns for ever; and as to the remaining one full undivided third part of all and singular the said hereditaments and premises, to the only proper use and behoof of the said *W. King*, his heirs and assigns for ever, and to or for no other use, intent, or purpose whatsoever; to be holden as to such part of the said hereditaments and premises thereby granted and released, as did lie within the said manor of *Prittlewell Priory*, of the said *D. Scrutton*, party thereto, his heirs and assigns, lord or lords of the same manor; and as to such part of the said hereditaments, thereby granted and released, as did lie within the manor of *Milton*, otherwise *Middleton Hall*, of the said *D. Scrutton*, his heirs and assigns, party thereto, lord or lords of the same manor, by such suit of court or other services, as were of right, and ought to be, done and performed by other the freehold tenants of the same respective manors, seised of estates of inheritance in fee."

At the trial it was proved that, since the date of the deed, the sea had gradually encroached upon the land, according to the testimony of some of the witnesses twelve or fifteen feet, according to the testimony of others much more, and, consequently, that the present high and low-water mark had advanced in the same degree inland since that time. There was some evidence to shew that the shore on the north and south had been formerly beaconed out. It was contended on the part of the defendant, that the deed of the year 1778 conveyed to the grantees the soil of the shore between high and low-water mark, wherever those marks might be. On the part of the plaintiff it was contended, first,

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that the deed did not convey the soil, but a mere privilege or easement of fishing, and laying oysters there; and, secondly, assuming that the deed did convey the soil, it conveyed only that part of the shore, which, in the year 1773, lay between high and low-water mark, and, consequently, that the plaintiff was entitled to recover for any stones taken by the defendant higher up on the shore than the high-water mark reached at that time. The learned Judge was of opinion, that the deed did not convey the soil of the shore to the grantees, but a mere right of fishing and laying oysters there, and under his direction the jury found a verdict for the plaintiff, subject to a reference as to the amount of the damages. *Taddy* Serjt. in *Easter* term obtained a rule nisi for a new trial, upon the ground that the deed did convey to the grantees the soil of the shore.

Marryat, Gurney, Comyn, and Andrews now shewed cause. The deed passed a mere easement or privilege, a right of fishery, and of laying and taking oysters on the shore; secondly, assuming that it passed an interest in the soil of the shore, still it could only convey the right of soil in 800 acres, described as bounded on the north and south by the then high and low-water marks. As to the first point, the deed in the first instance grants "all that messuage, tenement, and boat-house, and all those sea-grounds, oyster-layings, shores, and fisheries, called *Middleton Hall* and *Prittlewell Priory* sea-grounds and shores." The grantor only gives a qualified right in the shore for a particular purpose. The word oyster is connected with the three subsequent words, and, therefore, this part of the deed must be construed to operate as a grant of the oyster-shores, oyster-layings,

layings, and oyster-fisheries, and there then follows an express liberty to the grantees to fish, dredge, and lay oysters, and to take and carry away the same. Now, that liberty would have been wholly unnecessary, if the soil was intended to pass by the former words, for in that case the grantee would have had a right to use it as he thought fit. It is true, that the words *sea-grounds*, by themselves, would have been sufficient to pass the right of soil in the shore, but the whole of the grant must be construed together, and the words "*sea-grounds*" must be taken to pass an interest in the *sea-grounds*, sufficient to enable the grantees to exercise their right of fishing, laying, and taking oysters. The reservation of fish-royal, wreck of the sea, flotsam, jetsam, and ligan, throws no light upon the construction of the deed, because those being prerogative rights would not pass, except by express words.

Secondly, assuming that a right to the soil did pass by the deed, it could only be a right of soil in that land, which in the year 1773 was bounded by the high and low-water marks. It is specifically described by abutments, and "as containing by estimation 800 acres, covered with water, as the same were then beacons, marked, and stubbed out." The land granted, therefore, was a specific quantity of land, ascertained by certain marks, and the plaintiff now claims other land not within those marks. He claims, in fact, a moveable freehold; but there cannot be such a thing as a shifting freehold, and a deed professing to grant such an estate would be void for uncertainty.

Taddy Serjt., Preston and Knox, contra. The deed must be construed with reference to the intention of the

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parties at the time when it was executed, and the question will be, what the one intended to convey, and the other intended to purchase. The deed may be considered as consisting of five parts. The first part containing the substantial part of the grant, beginning with the grant of the messuage and tenement; the second, with the words "with full and free liberty to fish;" the third beginning with the words "which said sea-grounds," containing a description of the things granted; the fourth, containing an additional description, beginning with all the words "which said sea-grounds contain;" and the fifth the tenendum. Now the premises granted are "the messuage, tenement, or boat-house, &c., and also all that, and those the sea-grounds, oyster-layings, shores, and fisheries, called *Middleton Hall* and *Prittlewell Priory* shores or sea-grounds." The word *sea-grounds* in a grant would of itself be sufficient to pass the soil. If a man grant all his woods, not only the woods growing upon the land, but the land itself passes, for the word *woods* includes not only the trees, but also the land whereon they grow. (a) *Whistler v. Paslow*. (b) Supposing those words not to be sufficient to pass the soil, it passes by the words *sea shore*, which denote this land which is covered with water at high tide, and left uncovered with water at low tide. (c) The words *sea-grounds* and *sea-shores* have a certain definite meaning, which is not to be narrowed by the subsequent introduction of the unnecessary words "oyster-laying and fisheries." Effect must be given to all the words in the grant. Now, if the construction contended by the plaintiff prevails, no effect will be given to words *sea shores*. It is argued that the grantor

(a) *Co. Litt.* 4. b.(b) *Cro. Jac.* 487.(c) *Callis on Sewer*

tended to convey only a given quantity of land, marked out by certain fixed boundaries on the east and west, and the high-water mark and the low-water mark on the north and south, in the year 1773 ; but this is a mere addition to the description of the subject matter of the grant, which is sufficiently described in the former part of the deed. Now it is a general rule in the construction of deeds, that, if the subject matter of the grant be once sufficiently described in the deed, an error made in an addition to the description will have no effect, *Wrotesley v. Adams*, (a) *Swyft v. Eyres*. (b) Here, in the former part of the deed, the subject matter of the grant was sufficiently described by the words, "all those sea-grounds, oyster-layings, shores, and fisheries called by the name of *Middleton Hall* and *Prittlewell Priory* shores, or sea-grounds, and bounded on the east and west as therein described, and on the north and south by high and low-water mark." If, therefore, the space between high and low-water mark had comprehended 1000 acres instead of 800, they would have passed by the grant. The deed then contains a reservation, out of the grant, of fish-royal, wreck of the sea, flotsam, jetsam, and ligan ; now such a reservation would be wholly unnecessary if the former part of the deed had passed an easement only. Then by the tenendum the grantees are to hold the boat-house, sea-grounds, &c., with their appurtenances, of the lord of the two different manors, by such suits of court and other services as of right ought to be done and performed by other the freehold tenants of the manors seised of estates of inheritance in fee ; and it is obvious,

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(a) 1 *Plowden*, 191.(b) *Cro. C.r.* 546.

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from the reservation of the tenure as to two different manors, that the tenendum applied to the oyster-grounds, and is not confined to the boat-house. By the statute of *Westminster 2d*, the feoffee must hold the lands of the chief lord of the fee, and by the same services and customs as his feoffor had held them before. It is evident, therefore, from this clause of the deed, that the land between high and low-water mark was to be held, (though, in consequence of this statute, it could only be held of the superior lord, and not of the grantor as mesne lord,) for the lands only and not an incorporeal hereditament or easement could be held, an incorporeal hereditament not lying in tenure. Then, assuming that the deed conveyed a right of soil in the shore, it conveyed such a right in that portion of land which from time to time should constitute the sea shore, and not merely in that portion of land which constituted the sea shore in 1773. It has been said that there cannot be such a thing as a moveable freehold, and that this grant is void for uncertainty. But in *Co. Litt.* 48. b. it is laid down, that where a person has a moveable estate of inheritance in thirteen acres of land, parcel of a meadow of eighty acres, he may convey it by the description of thirteen acres lying within the meadow of eighty acres. That is an authority, therefore, to shew that there may be a moveable freehold, and that the description in the present case is sufficiently certain. The uncertainty in the description, if any, arises wholly from the uncertainty of the subject matter granted. Then, if there may be a moveable freehold, and it is sufficiently described, the question is, what was intended to pass. Now, it is clear, from the whole deed, that the grantor intended to part with all his interest in the shore.

shore which he himself had derived from the crown. According to the late case of *The King v. Lord Yarborough* (a), and the passages from Lord Hale's treatise *De Jure Maris*, there cited, it is established that land formed by the sea, by slow, gradual, and imperceptible accretion, *primâ facie* belongs to the crown, or the grantee of the crown. Inasmuch, therefore, as the shore, or the space between high and low-water mark, has been slowly and imperceptibly altered by the encroachment of the sea, the shore so altered would belong to the crown, and of course to its grantee, and, therefore, now belongs to those who claim under the deed of 1773.

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BAYLEY J. This action is brought upon the supposition that the deed of 1773 conveys a privilege and an easement only in the waste; and leaves in the grantor the general property in the soil, from low to high-water mark. If we are satisfied from the language of the deed that the soil passes, then the present verdict, to the extent to which it has been given, cannot be supported. It appears to me, that the deed does pass to the grantee, not a mere privilege or easement, but the soil, so far, at least, as the surface was concerned. The property is of a peculiar description, viz. land lying between high and low-water mark. The property in such land, *primâ facie*, is in the crown. It may, however, be in a subject, and different rights in that description of property may be vested in a subject, according to the terms of the grant. The king may have granted to a subject the soil itself, or the general privilege of fishing, or of laying, keeping, and taking oysters on that spot.

(a) 3 B. & C. 91.

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The rights, therefore, of the grantor, in this case, must depend upon the rights which he derived from the crown. If he intended to part with all that he had, and the extent of his rights were doubtful, he would probably use, in his conveyance, language calculated to pass every description of property which he at that time might possess. The deed purports to pass "all that and those, sea-grounds, oyster-layings, shores, and fisheries." If it had conveyed the sea-grounds only, that, *prima facie*, would have operated as a grant of the soil itself. For, generally speaking, the soil passes by the word *ground*, as, by the word *wood*, the soil in which the wood grows passes. If the grantor had intended to pass a limited specific privilege and easement in the soil, and not the soil itself, he ought not to have used such comprehensive words; but words limited and restricted in their sense. It seems to me, therefore, that if the grant had contained only the words *sea-grounds*, they would have passed the soil. But then, the words *oyster-layings* are introduced, and it is said, that from these words it is to be inferred that, by the words *sea-grounds*, it was intended to convey a privilege of laying oysters only. I think, however, that those additional words may have been introduced because the grantor was uncertain as to the nature of the right which he had actually derived from the crown. Then comes the word *shore*, which denotes that specific portion of the soil by which the sea is confined to certain limits. That term is wholly inapplicable to the grant of a privilege or easement; it of necessity comprehends the soil itself. But the word *fishery* immediately follows, and it is said that there could be no reason for introducing the word *fishery*, if the soil itself had been previously

previously granted. I have already observed that the grantee of the crown might either have had the soil, or the fishery, or the mere privilege of laying and taking oysters; or he might have taken the soil from the crown by one grant, and the fishery by another; and, in either case, it might have been a matter of doubt whether he had the right to the soil or a mere easement. It certainly would require very clear language to qualify the effect of the words *sea-grounds*, *oyster-layings*, and *shores*; and if I held that these words were qualified by the word *fishery*, I should limit the effect of words which have a certain definite meaning by a word apparently introduced for the purpose, not of limiting the grant, but of including any additional right which the grantee might possess. Then follow the words, "with full and free liberty for the grantees to fish, dredge, and lay oysters thereon, and from thence to take and convey the same." Now it has been said that if the soil had been previously granted, these privileges would have been incident to the grant of the soil, and, therefore, that the grant of these privileges shews that the soil was not previously granted. The liberty, however, is equally useless, whether the previous part of the deed conveyed the soil, or an easement only. The deed then excepts all manner of fish-royal. Such an exception might be material, for the grantee of the crown having previously granted the fishery, would have thereby conveyed any right that he had to fish-royal, unless there had been an exception in that respect. The exception of wrecks, flotsam, jetsam, and ligan was wholly useless, for those being prerogative rights, would not pass without express words introduced for that purpose. If those words have any effect, it is in favor of the defendant, for it is quite clear
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that if the grantor had intended to pass a privilege only, it would have been unnecessary to introduce them. Upon the whole of this deed, I am of opinion, that it must be construed to convey not a mere privilege and easement, but the soil itself.

That being so, the second question is, what soil did it convey? There is no dispute as to the limits on the east and west, but merely as to those on the north and south. It has been contended on the part of the plaintiff, that it does not convey that soil which from time to time is bounded by the high and low-water marks, but only that soil which at the time when the deed was executed was bounded by the then high and low-water marks. Now the passage cited from the 1st Inst. 48 b., shews that there may be a moveable freehold. It does not apply specifically to this case, because the case put there is of a given quantity of land fixed in situation, of which part from time to time may be vested in *A.* and the other part vested in *B.* The question here is, whether there may be a certain quantity of land shifting in situation and vesting in the same persons at different times? That must be the case of land fronting the sea or a river, where, from time to time, the sea or river encroaches or retires. If the sea leaves a parcel of land, the piece left belongs to the person to whom the shore there belongs. The land between high and low-water marks originally belonged to the crown, and can only vest in a subject as the grantee of the crown. The crown by a grant of the sea-shore would convey, not that which at the time of the grant is between the high and low-water marks, but that which from time to time shall be between these two termini. Where the grantee has a freehold in that
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which the crown grants, his freehold shifts as the sea recedes or encroaches. Then what was the object of the parties to the deed of 1773? To grant the land within certain limits. Those to the east and west were ascertained, but those on the north and south were to be ascertained by the high and low-water marks. I think that those words must be construed with reference to the rule of the common law upon the subject of accretion, and that as the high and low-water marks shift, the property conveyed by the deed also shifts. For these reasons I am of opinion that the plaintiff was not entitled to recover in respect of any part of the stones which were proved to have been taken between high and low-water marks.

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HOLROYD J. I am clearly of opinion, that the right to the soil passed by the deed. I think that the first part of the grant must be taken to operate as a conveyance of corporeal hereditaments (supposing always that the person assuming to convey had a right to convey corporeal hereditaments), and that the subsequent part of the deed operated as a conveyance of incorporeal hereditaments. Whether the grantor had or had not these corporeal rights, which he assumed to have, I think that the words, "with liberty to fish, &c." may have been introduced to remove all doubts as to the nature and extent of the rights granted. It is possible, that at some former period the right in the soil of the shore, and the right of fishing on the shore, may have existed in different persons, before they both vested in the grantor; and, therefore, that it may have been a matter of doubt, whether one was merged in the other. I think that the additional words were intended as words of amplification,

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and that they ought not to operate as words of restriction. In a deed, if the grantor do not mean to grant that which the words used in their technical meaning import, it is his duty to qualify those words; and if there be a reasonable doubt what the intention actually was, then such a construction is to be given to the deed as would be rather against the grantor than the grantee. Previous to the granting part of the deed there is a recital, that a recovery had been suffered of, amongst other things, the tenement, messuage, and boat-house, the sea-grounds, oyster-layings, shores, fisheries and hereditaments thereafter mentioned, and that they were comprized in a settlement there referred to. It then recites, that the grantees had consented and agreed for the absolute sale of the messuage or tenement, &c., and the sea-grounds, oyster-layings, shores, and fisheries, and hereditaments thereafter more particularly mentioned. Those are the sea-grounds, oyster-layings, shores, &c., which had been comprized in the recovery before. If they were corporeal tenements, the recovery would operate upon them, and they might have been demanded in a præcipe, but if they were not corporeal tenements they could not be demanded in a præcipe; they might pass as appurtenances, but would not themselves be the principal subject on which the recovery would operate, and it would only affect them, because it operated on other subjects to which they bore relation. Then by the granting part, "all that messuage, tenement, boat-house, &c., and also those sea-grounds, oyster-layings, shores, and fisheries," known by the particular names thereafter mentioned were conveyed. These terms import that corporeal tenements were conveyed
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and they are not to be narrowed and restrained, unless there is something to shew that such was the intention of the parties. Then the deed grants "full and free liberty for the grantee to fish, dredge," &c. That part of the grant was wholly unnecessary, for that privilege would pass under the words "sea-grounds and shores." If, however, the right of fishing continued to exist as a distinct privilege, and was not merged in the general right of the soil, these words would be useful to pass it, or if it were at all doubtful, whether it existed or not as a distinct privilege, they remove all doubt as to the intention to pass that privilege. Supposing the grantor's title to the sea-grounds was invalid, and he had the right of fishery, but not the soil, these words might be useful as granting the incorporeal right, although the grant would be void as to the corporeal right. They do not, therefore, shew any intention on the part of the grantor, that the corporeal right should not pass pursuant to the technical language of the former part of the grant. In a grant, it is not very material which of the parts stands first, and which last. Suppose that there had been a grant, "of full and free liberty to fish, dredge, and lay oysters, together with the sea-grounds," it could not be contended that the latter words would have no effect. They would operate as a grant of a corporeal tenement. The deed then proceeds, "with all the rents, issues, and profits of all and singular the said premises." All the issues and profits of what was before granted were to be taken, and not merely a particular profit arising from the right of getting fish. The grantor, therefore, uses extensive and sweeping words to shew that he meant to

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convey all that he could, with reference to the subject matter of the grant, and I am clearly of opinion, that the instrument was sufficient to pass the soil.

With respect to the other question, I am of opinion, that supposing the soil to be granted, it follows as a consequence, that the grantee, with respect to the shore, will stand in the same situation as the grantor would have stood, if he had not executed the deed. The grantor conveyed the whole of his shore between particular boundaries; he had, therefore, no part of it remaining in him, and the grantee stood in his situation. Then the accretion follows as an accessory to the principal. The change being gradual it becomes part of the shore, and belongs to the person who has the shore at the time when the accretion takes place. I think, therefore, that there should have been no new trial in this case, if it had appeared that all the stones had been taken from the shore. But as some of them were taken from the cliff above the high-water mark, a new trial must be granted, unless the parties can come to some arrangement upon the subject.

LITTLEDALE J. It seems to me that by this deed, the soil is passed not only in the 800 acres which were described in the deed, but also in any other land between high and low-water mark, imperceptibly added by accretion. Upon the construction of the deed, it is clear that if the words sea-grounds had stood alone, the soil would have passed under them. Sea-ground is either ground bordering on the sea or covered with the sea. The word *ground* itself is sufficient to pass the soil, and the word *sea* annexed to it only shews where it is situate.

taste. The next words *oyster-layings* would not of themselves pass the soil, but the word *shores*, unconnected with other words, would pass the soil. It is said, however, that that word is to be coupled with the word *oyster*, and, therefore, that the deed only imported to convey *oyster-shores*. I see no reason why they should be coupled together; but supposing it to be so, that would not make it less a shore, and that would be sufficient to pass the soil. It would only denote the purpose to which the land was applied, viz. that it was a shore where oysters were got; just as the words *arable land*, *pasture land*, *wood land*, denote the purposes to which the land is applied. Then as to the word *fisheries*, it is said, that with that word *oyster* must be coupled: but I do not know why they are to be connected together. It may, indeed, be said that the word *fishery* is unnecessary, for if the soil passed the fishery passed also, but that is not so. A fishery in a river would pass by the conveyance of the adjoining land, because of common right it might be incident to the soil, but in this case it was absolutely necessary to grant the fishery, for the grant of the soil would not be sufficient to convey a peculiar privilege to fish between high and low-water mark, because all the king's subjects would have a right to fish there, unless a particular person was entitled to it by specific grant or prescription. The fishery, therefore, would not pass by the word *soil*; and supposing that the soil passed by the deed, the word *fishery* might nevertheless be properly introduced to give the privilege of fishing. Perhaps even the words *oyster-layings* would not pass the privilege of getting oysters; because those words only import a privilege of laying oysters

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there, and it might be doubtful whether it would give a right to take them. But then the words are "all those sea-grounds called by the name of *Middleton Hall Shores and Sea-Grounds*;" so that the grant applies to some shores called by a particular name. It is evident, therefore, that they were the grounds and shores which had been granted before. Then come the words "full and free liberty to fish," &c. Now, supposing that liberty to have been accessory to the grant of the soil, it is clear that the unnecessary addition of those words does not restrict the grant, but only explains the intention of the parties, *The Earl of Cardigan v. Armitage*. (a) By the grant of the soil the party has no peculiar right to fish; but he might have a right to fish, dredge, and lay oysters by a grant of the fishery. Then, in the exception, there are no words which have any bearing on the present case; but there is one which is insisted upon, "except fish royal." Now it was necessary to except them, for otherwise they would be conveyed; for the exception implies that, but for that exception, the thing was before granted.

Then, supposing the soil passes, the other question is, whether it is to be confined to the 800 acres mentioned in a subsequent part of the deed? Now the grant is of those sea-grounds which went by the name of *Middleton Hall Shores and Sea-Grounds*. Therefore, the only subject of enquiry is, whether the place in question, from whence the stones have been taken, is called by either of those names; for the subject matter of the grant cannot be affected by the subsequent part of the deed, which has nothing to do with the grant, but is merely matter of

(a) 2 B. & C. 197.

description.

description. The distinction is well established, that where there are words sufficient to pass property in the first instance, and there are in a subsequent part of the deed words of affirmation, these latter words, though they may be wrong in point of description, do not affect the previous part of the grant. The words are, "which said sea-grounds," &c. (after description of their boundaries on the north and south by high and low-water mark, and on the east and west by the grounds of particular persons) "do contain, on the whole, 800 acres of land covered with water." Now these words of suggestion or affirmation may be true or false. Instead of 800 acres there might have been 5000 acres, and it is quite immaterial whether they were bounded on the east and west by the lands of the persons mentioned in the deed; because, in the operative part of the grant, the sea-grounds are the thing granted, and the latter words will not vitiate that grant, which extends to all the shores going by the name of *Middleton Hall Shores* and *Sea-Grounds*. The only remaining question is, whether the accretion which has taken place passes by that grant. I think it quite clear, from the case of *Rex v. Lord Yarborough*, and Lord *Hale's* treatise *De Jure Maris*, that the increase being imperceptible, continued to pass as incident to that which belonged to the grantee. Upon that principle, I am of opinion that the land between high and low-water mark constitutes a part of *Middleton Hall Shores*, or sea-grounds, and that the deed is sufficient to pass the accretion which has taken place.

Rule absolute for a new trial.

The amount of damages was referred to a barrister.

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LEWIS *against* G. BOWEN JONES.

In an action upon a promissory note against a party who had indorsed it for the accommodation of the maker, it appeared that the plaintiff, the indorsee, had signed an agreement to accept from the maker of the note 5*s.* in the pound in full of his demand, on having a collateral security for that sum from a third person. It further appeared that the agent of the maker had represented to the plaintiff before he signed the agreement that the defendant would continue liable for the residue of the debt secured by the note, and that the agreement would be void unless all the creditors signed. Held, first, that the execution of this agreement had the effect of discharging the surety; secondly, that the representations being as to the legal effect of the agreement, were immaterial, and had not the effect of avoiding it, and that as the latter of them gave to the agreement a meaning different from that which appeared upon the face of it, parol evidence of that representation was not admissible, per *Bayley J.*

THIS was an action on a promissory note for 150*l.*, dated the 15th of *March* 1821, made by one *William Walter Jones*, payable two months after date to the defendant, and by him indorsed to the plaintiff. At the trial before *Garrow B.*, at the last spring assizes for the county of *Hereford*, it appeared that *William Walter Jones*, the defendant's brother, being indebted to the plaintiff, the defendant *G. B. Jones*, for the accommodation of his brother, became a party to the note in question. It was proved by a witness who, on behalf of the plaintiff, had applied to the defendant for payment after the note became due, that he had said he would call and settle it, but at the same time asked the witness to request the plaintiff to suspend proceedings until an investigation of his brother's affairs had taken place, and that he should be much obliged to the plaintiff if he would get what he could from his brother, and relieve him, the defendant; that, at a subsequent time, the witness saw the defendant again, and told him that the plaintiff would have nothing to do with his brother, as he had left the country, and that he should look entirely to the defendant; that the defendant then said that one *Morgan*, an auctioneer, had investigated his brother's affairs, and had ascertained that there would be five shillings in the pound for the cred-

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ditors. It was further proved by the same witness, that the plaintiff and defendant afterwards met together, and that the defendant told the plaintiff that as he had signed an agreement for a composition of five shillings in the pound, he was not entitled to the whole debt, but that the defendant would give him a note for fifteen shillings in the pound: that the plaintiff then said that he had signed the agreement for composition, on the understanding that all his brother's creditors would come forward and sign the agreement, and accept the composition; but that as they had not done so, he considered the agreement to be null and void. It appeared further, on the cross-examination of this witness, that the plaintiff told him he had signed the agreement for composition on the faith of the promise of the defendant that he would pay the remaining fifteen shillings in the pound. For the defendant it was proved that, at a meeting of *William Walter Jones's* creditors, on the 29th May 1824, the plaintiff signed the following paper: "We, the undersigned creditors of *William Walter Jones*, agree to accept of five shillings in the pound in full of our original demands against him, on having a joint note from him and his father, *William Jones*, payable in twelve months from the date hereof." The father and *W. W. Jones* gave their joint note to the plaintiff, in pursuance of the agreement. Another witness swore that *Morgan*, as agent of *W. W. Jones*, at the meeting of creditors convened for the purpose of signing the agreement for composition, stated that unless all the creditors signed, the paper was to go for nothing; and that the defendant, notwithstanding that the plaintiff signed the agreement, would continue liable for the residue of the debt, secured by his note. The learned Judge told the jury to

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find for the plaintiff, if they thought that he was induced by any false representation to sign the agreement, otherwise to find for the defendant. The jury having found a verdict for the plaintiff, a rule nisi for a new trial had been obtained in last *Easter* term, upon the ground that by the agreement for composition, and the plaintiff's acceptance of the joint note from *W. W. Jones* and the father, the original debt was extinguished, and that the surety was therefore discharged.

Russell and *R. V. Richards* now shewed cause. The debt due from the defendant to the plaintiff upon the promissory note was not extinguished by the agreement for composition. At the time when the agreement was signed, the note was an existing security, and there was no stipulation that it should be given up. On the contrary, there was an express undertaking by the defendant that it should continue in force against him, and a request by him that the plaintiff would obtain all he could from the principal debtor. It is true, that a creditor, by entering into a composition with the principal debtor, without consent of the surety, discharges the latter: yet that rule is founded on the principle that it is against conscience that persons should be placed in a situation in which they have not contracted to be placed. Here the surety had contracted to be placed in that situation. There is no doubt that if a new security had been given for the payment of any thing beyond the composition money, it would have been void, *Cockshott v. Bennett* (a), *Stock v. Mawson* (b). But this is more like the case of *Thomas v. Courtenay* (c), where the creditors of an insolvent agreed by an instrument (not under seal) that they would

(a) 2 T. R. 763.

(c) 1 B. & A. 1.

(b) 1 Bos. & Pul. 286.

accept,

accept, in full satisfaction of their debts, twelve shillings in the pound, payable by instalments, and would release him from all demands, and it was held that the agreement did not extinguish the debt, and did not discharge a surety for it. Besides, here the question as to the extinction of the debt does not arise, for the jury have found that the plaintiff was induced to sign the agreement by a delusion practised upon him. It is clear that a creditor is not bound by an agreement for composition, if any misrepresentation has been used to obtain his consent, *Cooling v. Noyes* (a). Now here there were two most material misrepresentations made by the agent of the principal; first, that the surety would continue liable for the residue of the debt secured by the promissory note, notwithstanding the agreement for composition; and, secondly, that the agreement would be void, unless all the creditors came forward and signed. Now, if the original debt was extinguished (as contended by the defendant) the first representation was false. In fact, several of the creditors did not sign, and, if the agreement be valid, the second representation also was false, and such misrepresentations make the deed void ab initio on the ground of fraud. [*Bayley J.* Is not the effect of these representations to shew the legal effect of the instrument to be different from what it appears to be, and if so, were they admissible in evidence?] The representations tend to shew that the agreement is void ab initio on the ground of fraud, and, therefore, that it has no legal effect whatever.

W. E. Taunton and *Campbell* contra. In *Cockshott v. Bennett* (b), one of the creditors, before he executed the

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(a) 6 T. R. 263.

(b) 2 T. R. 763.

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agreement for composition, obtained from the insolvent, a promissory note for the residue of his debt, and that was held to be void, inasmuch as it was a fraud on the other creditors, who had mutually contracted with each other, that the insolvent should be discharged from his debts, after the execution of the deed. Now the defendant in this case could only be liable to pay the debt in default of its not being paid by his brother. The effect of the composition, therefore, was to make the defendant's liability absolute, which before was only contingent. The defendant in case of paying this note to the plaintiff would have his remedy over against *W. W. Jones* for money paid, this being an accommodation indorsement. Then the stipulation, that the debt should continue, was a fraud upon the father, who gave his promissory note on the faith, that it was to be received in full discharge of his son *W. W. Jones*. He was no party to that new contract, and, therefore, cannot be bound by it. In *Thomas v. Courtenay* (a), the security held to be available was an acceptance of a bill drawn by the principal debtor, and an acceptor is *prima facie* the debtor of the drawer; and in that case *Bayley J.*, said "if it could be made out that Colonel *Gower* had a remedy over against *Baker and Son*, that might have varied the case." Assuming that the defendant is discharged by the general law on this subject, the representations made that he would continue liable, notwithstanding the signing of the agreement by the plaintiff, and that the agreement would be nugatory unless all the creditors signed, are immaterial, because, at most, they are representations merely as to the legal effect of the agreement, of which every party is presumed to be cognizant, and not mis-statements of the contents of the instrument. In the

(a) 1 B. & A. 1.

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latter case, if the plaintiff had been induced to sign under an entire ignorance of what he was doing, it might have been a fraudulent transaction. But there is no pretence for saying that, for the plaintiff accepted the joint note, which was a new security from the father, under the composition. Having accepted this benefit he cannot now repudiate the other consequences of it. Of these the principal one is to extinguish the debt, and to operate against all the parties signing, whether the other creditors executed it or not, there being no stipulation to the contrary. These representations were not properly received in evidence, inasmuch as the effect of them was to contradict or to control the written instrument.

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BAYLEY J. I think that there ought to be a new trial in this case. There can be no doubt, that if a creditor who signs a composition deed or agreement, and thereby induces other creditors to sign it, makes any private bargain, the effect of which is to place himself in a better situation than the other creditors, he thereby commits a fraud upon them, and that such private bargain is void. That is established by several authorities. It is unnecessary in this case to decide the question, whether a creditor who signs an agreement for a composition at the instance of a person jointly liable with the insolvent, and takes an engagement from that person that he will make up the difference between the debt due and the composition-money, can have any remedy against the surety, because it has not been submitted to the jury in this case, whether there was such a bargain or not. The only question, therefore, is, whether the plaintiff was induced by any fraudulent representation to sign the agreement. It was represented by the agent
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of the insolvent to the creditors convened for the purpose of executing the agreement of composition, that the surety would continue liable, notwithstanding the agreement of the creditor to accept, in full, five shillings in the pound, to be secured by the father. That, however, was a misrepresentation merely of the legal effect of the agreement. Now, every man is supposed to know the legal effect of an instrument which he signs; and, therefore, this must be taken to be a representation as to a fact within the knowledge of the creditor, and such misrepresentation will not have the effect of avoiding this instrument, because it was not calculated to mislead the creditor. But the agent of the insolvent also represented to the creditors, that the instrument would be void, unless all the creditors signed. There can be no doubt that an agreement for a composition ought to contain a clause to that effect, and that no man in his senses ought to sign such an instrument without it, for otherwise the object of the instrument may be defeated; but here there is not any clause in the agreement, or any memorandum attached to the signature of the plaintiff, by which he declares that he signs it upon that condition. If a party at the time when he signs an instrument annexes to his signature a condition that the deed is only to have effect against him in case all the creditors sign it, it will be void as to him, unless they do sign. But if he puts this condition on the face of the instrument, other creditors will not be induced to sign by seeing his signature, except upon the same terms which he has annexed to it, but if a creditor signs such an instrument generally, he becomes a party to it unconditionally, and then the legal effect of the instrument must be collected from the instrument itself, and not from verbal declarations made by the parties at
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the time when they executed it. On the face of this instrument the plaintiff has not annexed any condition to his signature, and that being so, I think that parol evidence of such a representation was not admissible, and, consequently, we are not warranted in saying that the instrument was null and void ab initio, on the ground that all the creditors have not signed. That being so, the rule for a new trial must be made absolute.

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HOLROYD J. I also think there ought to be a new trial. Although this be a case where the action is brought against a surety, it must be considered in the same light, as if it was brought against the principal. If the original debt be satisfied and gone, no action will lie against the surety. The extinguishment of the debt puts an end to the agreement of the principal and surety. Now, unless the agreement for the composition can be got rid of on the ground of fraud, I think it operates as an accord and satisfaction of the original debt. The agreement imports that the creditors were to accept five shillings in the pound in full of their debts, &c. Now an acceptance of a smaller sum cannot be pleaded as a satisfaction of a larger. In point of law something further is necessary to produce that effect. But I think that when the plaintiff in this case accepted the father's note as a security for payment of the composition-money, the agreement did operate as a satisfaction and as an extinction of the debt. (a) It has been contended that there was evidence to shew that the defendant contracted that the debt due on the promissory note should continue against him. By the agreement for the composition,

(a) See *Steinman v. Magnus*, 11 East, 390.

however,

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however, it is expressly stipulated that the sum of five shillings in the pound is to be accepted in full. Any parol evidence to shew that the debt was not fully satisfied would go to contradict the agreement of the parties, and would, therefore, be inadmissible. It is not necessary, however, to decide that point. Here the father of the defendant was no party to such an engagement. He gave his note upon the faith that the agreement for composition was to be performed, and he was not privy to any agreement that the debt was to continue against the surety. To hold the surety now liable would operate as a fraud upon the father. With respect to the effect of the representations, if admissible, it may suffice to say that the plaintiff should have returned the note, if he intended to say that the agreement for composition was thereby rendered void.

LITLEDALE J. I am of opinion, for the reasons already given, that this agreement was not void, on the ground that the plaintiff was induced to sign it by misrepresentation. It might be a question, whether an agreement, that the surety was to continue liable to the creditor, and that he should not afterwards have recourse to the principal debtor would be valid, notwithstanding the creditor signed an agreement to accept from the principal five shillings in the pound, in full satisfaction of the debt; but there was hardly evidence of such an agreement, and I incline to think, that if there was, it would not have been binding on the surety, for this reason, that if it were allowed to continue a debt against the surety, it would be a fraud upon the other creditors, who supposed they had contracted with each other upon
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equal terms. I think it better and safer to lay down as a general rule, that any private bargain, the effect of which is to give one creditor an advantage over the others is void, the principle of composition being that all creditors shall stand on the same footing. Without, however, giving any decided opinion upon that point, I think, for the reasons already given, that the rule for a new trial must be made absolute.

Rule absolute. (a)

(a) Generally speaking a creditor discharges a surety by giving time to or compounding with the principal debtor.

The cases upon this subject may be divided into two classes; the first, where the agreement with the principal may be considered as a fraud upon the surety, by altering his situation or increasing his risk. Such were the cases of *Nisbet v. Smith*, 2 Br. C. C. 579. *Ex parte Smith*, 3 Br. C. C. 1. *Rees v. Berrington*, 2 Ves. Jun. 540. *Law v. E. I. Company*, 4 Ves. Jun. 824. *Eyre v. Bartrou*, 3 Mad. 221.

The second, where allowing the creditor to recover against the surety would operate as a fraud upon the principal, or any person joining with him in paying or securing the composition money, inasmuch as it would give the surety a right to proceed against the principal for that debt, from which the creditor had agreed to discharge him, *English v. Darley*, 2 Bos. & Pul. 61. *Burke's* case, there cited by *Ld. Eldon*, *Ex parte Gifford*, 6 Ves. Jun. 805. *Boulbee v. Stubbs*, 18 Ves. Jun. 20. *Ex parte Glendinning*, *Buck*, 517.

It is obvious that the first ground of discharge is inapplicable where the agreement between the creditor and principal debtor is made with the privity and assent of the surety; and it seems that the second is inapplicable where the surety becomes a party to the transaction in such a manner as to deprive himself of any remedy over against the principal, in the event of his being called upon to pay the residue of the debt. Where a surety compels the creditor to sue, or prove under a commission of bankruptcy against the principal, he is considered as electing to stand in the situation of the creditor with respect to the remedy against the principal, and in order to do so must bring the debt into court, *Beardmore v. Cruttenden*, *Co. Bank Laws*, 211. *Dict. per Ld. Ch. in Wright v. Simpson*, 6 Ves. Jun. 734. Hence it may follow that if a creditor, at the request of the surety, and for his relief, agrees to accept a composition from the principal, the surety would be considered as electing to stand in the situation of the creditor, and that he could not recover over against the principal upon being

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being compelled to pay the residue of the debt. In *Ex parte Glendinning, Buck*, 517. the Ld. Chancellor is reported to have said that a creditor entering into an agreement for a composition with a debtor, and wishing to retain his remedy against a surety, must cause the reservation to appear upon the face of the agreement, for that parol evidence cannot be admitted to explain or vary the effect of the instrument. If that observation is to be construed *generally*, it will greatly simplify questions upon this subject; for then, wherever a creditor and principal debtor have entered into an agreement for a composition, not containing a reservation of the remedy against a surety, and an action is afterwards brought against the latter, it will be unnecessary to inquire whether he was or was not privy and consenting to the agreement, or whether he has or has not done any thing to deprive himself of the right to recover over against the principal; he will be absolutely discharged by the agreement entered into between the creditor and the principal debtor. But the judgment in *Ex parte Glendinning* appears to be founded upon *Burke's case*, which is also cited by the Ld. Chancellor in *Ex parte Gifford*, 6 Ves. Jun. 809, as an authority for saying that where the remedy against the surety is reserved in the agreement for composition, a recovery against the surety cannot operate as a fraud upon the principal; for that if demand out of that recovery arises against him, it is with his own consent. Perhaps therefore the observation in *Ex parte Glendinning* was intended to apply to those cases only where, but for the reservation in the agreement, the proceeding against the surety would operate as a fraud upon the principal, and parol evidence may still be admissible to shew that the composition was made with the privy and at the request of a surety, and that he has deprived himself of any right to recover over against the principal; for such evidence would leave the written instrument (according to its import) a discharge to the principal, and would not contradict it, unless indeed it be so framed as to *extinguish* the debt.

There is another large class of cases in which it has been held that a person joining other creditors in compounding with a debtor, or signing a bankrupt's certificate, cannot lawfully stipulate for any benefit to himself beyond that which the other creditors receive; whether that benefit be given by the debtor himself or any third person for his relief, *Smith v. Bromley*, 2 Doug. 695. *Cecil v. Plaistow*, 1 Anstr. 202. *Cockshott v. Bennett*, 2 T. R. 763. *Jackson v. Lomas*, 4 T. R. 166. *Feise v. Randall*, 6 T. R. 146. *Jackman v. Mitchell*, 13 Ves. 581. *Leicester v. Rose*, 4 East, 372. *Wells v. Girling*, 1 B. & B. 447. *Jackson v. Davison*, 4 B. & A. 691. But all those decisions related to new securities given as a consideration for signing the composition-deed or certificate, and proceeded on the ground that the advantage gained by the particular creditor was a fraud upon the others, and they do not appear applicable to securities existing before the negotiation for a composition. See *Thomas v. Courtney*, 1 B. & A. 1.

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**ROHDE and CAMPBELL against PROCTOR and
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THIS was a feigned issue directed by the Vice-Chancellor to try the question, whether, on the 10th of *May* 1821, there was any debt due under and by virtue of five several bills of exchange set forth in the declaration drawn by one *John Soady Rains*, upon and accepted by one *Joseph Lacklan*, or any of them, which debt was proveable by the plaintiffs, as assignees of *Sawyer, Jobler, and Co.*, the indorsees of the said bills, under a commission of bankrupt issued against the said *J. S. Rains*. At the trial before *Abbott C. J.*, a verdict was found for the plaintiffs, that there was a debt under and by virtue of the said bills of exchange, which was proveable under the commission issued against the said *J. S. Rains*. On a motion before the Lord Chancellor, on the part of the defendants for a new trial, his Lordship directed the following case for the opinion of this Court, upon the points which had been raised before the Vice-Chancellor. The five bills of exchange set forth in the declaration became due in the month of *June* 1818. The drawer, *J. S. Rains*, left his dwelling-house on or about the 17th of *April* 1818, and absconded and went abroad, and never returned again. On the 20th of *April* 1818, a commission of bankrupt was issued against drawer. Held, that the bill was not proveable under the commission issued against the drawer.

The Drawer of a bill of exchange became bankrupt and absconded before it was due, but his house remained open, in the possession of the messenger under a commission of bankruptcy issued against him, for some time after the bill became due, and before that time the holder of the bill had notice that *A.* and *B.* were chosen assignees of the bankrupt's estate. The acceptor also became bankrupt before the bill was due, and when due it was dishonored. The holder did not give notice of the dishonor to the drawer or leave it at his house, nor did he make any attempt to give such notice to the assignees of the

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against
PROCTOR.

J. S. Rains, under which commission the defendants were duly chosen assignees, and the bankrupt's effects were assigned to them previously to the time when the said bills of exchange became due. The bankrupt did not surrender to his commission, the time for which surrender was limited to the 23d of *June* 1818. The bankrupt's house remained open, in the possession of the messenger under the commission, for some time after the bills were due. The acceptor became bankrupt on the 23d of *April* 1818, and the bills were dishonored when they became due, but no notice of the dishonor was given to the drawer, or left at his house. The holders of the bills had notice before the bills became due, that the defendants had been chosen assignees of the estate and effects of the said *J. S. Rains*, but no notice of the dishonor of the bills was given, or attempted to be given, to the defendants. The commission of bankrupt against *Sawyer, Jobler*, and Co. was issued on the 29th of *October* 1818, and the plaintiffs are their assignees and the holders of the bills. The question for the opinion of the Court was, whether, under these circumstances, the bills were proveable under the commission issued against the drawer?

F. Pollock for the Plaintiffs. The assignees of the holder of the bills in question are entitled to prove the amount under the commission against the drawer. The bills were running at the time when the drawer became bankrupt, he absconded long before they became due; and, therefore, as personal notice of the dishonor of the bills could not be given to him, it was unnecessary to give any notice at all. Suppose the drawer had ab-
 sented

sented himself, but had not become bankrupt, he might have been sued on these bills, although notice had not been given. Neither was it necessary to give notice to his assignees. They do not for this purpose represent the person of the bankrupt, and there is no case deciding that they are entitled to notice under such circumstances. It must be admitted, that the bankruptcy of the drawee furnishes no ground for neglecting to present a bill for acceptance or payment, or for omitting to give notice of the non-acceptance or non-payment, *Russel v. Langstaffe* (a), *Esdaile v. Sowerby* (b), but that is because the bankrupt may find friends to assist him in making the payment. But it does not thence follow that the assignees of a bankrupt drawer are entitled to notice of dishonor. They are merely trustees to collect the assets of the bankrupt, and distribute them amongst the parties entitled. Any rule requiring notice to these defendants, would equally apply to the assignees under a voluntary assignment for the benefit of creditors. The reason for requiring notice of dishonor is, that the party may withdraw his funds out of the hands of the acceptor, but that reason does not apply to the assignees of a bankrupt, for they are bound as soon as possible to get in the whole of the bankrupt's property.

Tindal for the defendants. The holders made these bills their own by negligence, either in not using due diligence to give notice to the drawer, or in neglecting to give notice to his assignees. The case does not state that the absconding of the drawer was known to the holder

1825.

 ROWDE
 against
 PROCTOR.
(a) *Doug.* 514.(b) 11 *East*, 114.

1825.

ROMER
against
FACTOR.

of the bills; if, therefore, judgment be given for the plaintiffs, the Court must judge by the event, whether it was necessary to give notice, and not by the conduct of the party at the time, whether he was guilty of any negligence. It is a general rule that notice must be given, and if a party is to be excused from that obligation, he must bring himself strictly within the exception. He must either give notice or use diligence in attempting to do so, *Bateman v. Joseph* (a), *Beveridge v. Burgess* (b), *Crosse v. Smith* (c), *Goldsmith v. Bland*. (d) None of those cases turned upon the question, whether an attempt to give notice would have been effectual, but whether the attempt was, in fact, made. In the present case, notice might have been left at the drawer's house, and that might have reached him; but no endeavour was made to find or communicate with him. In *Brett v. Levett* (e), the want of notice to a bankrupt drawer, was supplied by proof of an admission by him that he knew the bill would not be paid; and it was never contended that notice was unnecessary in general where a drawer had become bankrupt. Secondly, if notice to the bankrupt was unnecessary, still it should have been given to the assignees. In ex parte *Moline* (f), a bill having been dishonored, and the drawer having become bankrupt, notice was given to him before assignees were chosen under the commission, and Lord *Eldon* held that to be sufficient, because the bankrupt represents his estate until assignees are chosen. From that case it follows,

(a) 2 *Campb.* 461.(b) 3 *Campb.* 262.(c) 1 *M. & S.* 545.(d) *Bayley on Bills*, 224.(e) 13 *East*, 213.(f) 19 *Ves.* 216.

that

that where a bill is dishonored after the choice of assignees, notice should be given to them. It may be very important for the assignees to have notice in order that they may be acquainted with the real state of the bankrupt's affairs. [*Bayley J.* They may have an interest in watching the estate of the acceptors also, *ex gr.* where he becomes bankrupt with funds of the drawer in his hands, his estate might pay a large dividend before the assignees of the drawer knew that the bills would fall upon their bankrupt's estate.] Again, the argument as to assignees under a voluntary assignment does not apply, for the assignees of a bankrupt are by statute made his representatives, and sue in their own names. Suppose the case of a drawer dying before the bill becomes due, and that the residence of his executor is known to the holder; if the bill is dishonored, notice must be given to the executor. Now an executor, who is by proceedings in equity compelled to administer the estate equally amongst creditors, is precisely in the same situation as the assignee of a bankrupt. The plaintiffs, therefore, having neither given nor attempted to give notice of the bills in question, have made them their own; the absconding of the drawer not being under the circumstances of this case any excuse for the neglect.

Pollock in reply. The case *ex parte Moline* proves nothing beyond the sufficiency of the notice in that particular case. The deduction attempted to be drawn from that case is, that after the choice of assignees, notice must be given to them, and not to the bankrupt. But suppose a commission to be superseded, the notice to the assignees would be nugatory as against the bank-

1825.

 Remex
 against
 Paecros.

1825.

Rever
against
Packer.

rupt. The assignees can only claim a right to notice on the ground of some injury to the bankrupt's estate. At all events, therefore, it is sufficient to place them in as good a situation as a person guaranteeing a bill, who cannot avail himself of the want of notice as a defence, unless he has thereby sustained an injury. It is not pretended that their bankrupt's estate has sustained any injury from the want of notice.

Cur. adv. vult.

The judgment of the Court was now delivered by

BAYLEY J. This was an issue from the Court of Chancery on the question, whether plaintiffs as assignees of Messrs. *Sawyer, Jobler, and Co.* had any debt proveable under the estate of *John Soady Rains*, a bankrupt. Their claim was upon five bills of exchange, drawn by *Rains* upon *Joseph Lacklan*, and indorsed to *Sawyer and Co.*; the bills became due *June* 1818, and before that time *Rains* and *Lacklan* had both become bankrupts, and *Rains* had not surrendered to his commission. *Rains* committed his act of bankruptcy by leaving the kingdom on the 17th of *April* 1818. A commission issued against him on the 20th, and he has never returned. *Lacklan* became bankrupt on the 23d of *April* 1818. When the bills became due they were dishonored, but no notice was left at *Rains's* house, nor sent to his assignees; the house was open at the time, and the messenger in it, and the holder of the bills knew the defendants were *Rains's* assignees, and the question upon these facts was, whether the want of notice was a bar to the plaintiff's claim; and we think it was. When
a bill

a bill is dishonored, it is the duty of the holder to use due diligence to give notice to such of the parties to the bill as would be entitled to a remedy over upon it, if they took it up, and the holder makes the bill his own as against those parties, and loses his remedy upon the bill against them by neglecting to use such diligence. It is no excuse that the chance of obtaining any thing upon the remedy over was hopeless, that the person or persons against whom that remedy would apply, were insolvent or bankrupts, or had absconded. Parties are entitled to have that chance offered to them, and if they are abridged of it, the law, which is founded in this respect upon the usage and custom of merchants, says they are discharged. The bankruptcy, therefore, of *Lacklan* is no excuse for the want of due diligence, if such want exist in this case, but the question must be answered as it would have been, had *Lacklan* continued solvent. Had *Lacklan* been solvent, and *Rains's* assignees had been apprized of the dishonor, they might at all events have pressed *Lacklan* to pay, and had they thought fit to take up the bill they might have sued him. Of these opportunities in this case they have been deprived, and the question is, whether they have been deprived by the want of that diligence which they had legally a right to expect from the holders. It is not necessary to decide in this case, whether in the event of the bankruptcy of a party intitled to notice, the holder is bound to endeavour to find out his assignees: nor is it necessary to say what would be the case, if such a party's house were shut up, and there were no means afforded there of discovering him or his representatives, for in

1825.

 Remedy
 against
 Deceit.

CASES IN TRINITY TERM

1825.

Rowe
against
Proctor.

this case the bankrupt's house continued open; the agent of his representatives, the messenger, who was also in some degree his representative, was there, and a notice there would have reached the assignees, and have given them the power of considering whether they should have taken any and what steps against *Lacklan*. In a very excellent modern publication on the law of bills of exchange, combining the *Scotch* and *English* law upon the subject, *Thompson* 535, it is laid down that in case of the bankruptcy of the drawer, or of an indorser, notice must still be given to the bankrupt, "or to the trustee vested with his estate for behoof of his creditors," and he refers (amongst other decisions) to the case *ex parte Moline*. Whether this be universally and in all cases true, it is not now necessary to decide; all the present case requires is this, that where the bankrupt's house continues open, and an agent of the assignees there, notice is essential, and a neglect to give it bars the holder's claim against the bankrupt's estate. The bill therefore, were not proveable under the commission issued against the drawer.

Postea to the defend

1825.

PRICE *against* SEAMAN (in Error).

ASSUMPSIT by *Seaman* against *Price*, on a special agreement. The first count of the declaration stated that the plaintiff below, before the making of the promise of defendant below, had bargained and agreed with one *J. E.* for the purchase by him, plaintiff, of three freehold houses, situate, &c., of and from the said *J. E.*, to be conveyed to the said plaintiff, and at the price of 600*l.* And the defendant was desirous of obtaining the said bargain, and becoming the purchaser of the said houses, instead of the plaintiff, to wit, at, &c., and thereupon heretofore, to wit, on, &c., at, &c., in consideration that the plaintiff, at the request of the defendant, would sell and give up to the plaintiff the said bargain, and would suffer and permit the said defendant to become the purchaser of the said houses from the said *J. E.*, instead of him the plaintiff, defendant undertook to pay him 40*l.* And the plaintiff averred that he, confiding in that promise, did sell and give up the bargain to defendant, and did suffer and permit him to become the purchaser of the houses of and from *J. E.*, instead of plaintiff; and the defendant did accordingly become such purchaser, and did take the said bargain, and obtain a conveyance to him, defendant, of the said houses, on the terms aforesaid. Breach, non-payment of the 40*l.* (There were other special counts which it is unnecessary to state, as no objection was made to them.) Plea, general issue. The jury having found a general

tiff and *J. E.* was in writing, and that the giving up of that contract to defendant was a sufficient consideration for his promise.

Where in assumpsit plaintiff declared that he had bargained and agreed with one *J. E.* for the purchase of certain freehold houses at a certain price, and defendant in consideration that plaintiff would sell and give up to him (defendant) the said bargain, and suffer him to become the purchaser of the houses; promised to pay 40*l.*, and averred that plaintiff did give up the bargain to defendant, and suffered him to become the purchaser, and that defendant did accordingly become the purchaser and take the said bargain and obtain a conveyance from *J. E.* on the terms aforesaid; but that defendant had not paid the 40*l.* Held, after verdict for the plaintiff, that it must then be presumed that the bargain between plaintiff and defendant was a

verdict

1825.

PRICE
against
SEAMAN.

verdict for the plaintiff, and a general judgment having been thereupon entered up in the Court of Common Pleas (a), the defendant brought a writ of error, and assigned for error that the contract set out as a consideration for the promise in the first count was a contract, or agreement, respecting a sale of land, yet was not stated to be in writing; that no sufficient consideration for the promise was stated; that the contract was a mere chose in action, and not assignable.

Barstow for the plaintiff in error. The consideration alleged in the first count for the plaintiff's promise is the sale of a bargain and agreement made between the plaintiff below and one *J. E.*, for the purchase of certain houses. It is not stated that the bargain and agreement was in writing, and, therefore, no sufficient consideration is shewn for the promise in that count: for if the bargain and agreement was not in writing, it was not binding upon *J. E.*, and then it was no consideration at all. It may be urged, that in an action on a guarantee it is not necessary to state that it was in writing; but that is quite a different case, for without that a sufficient consideration for the guarantee may be shewn, and must be shewn. Here, for want of a writing, there was no consideration. Even supposing that the Court would presume the contract to have been in writing, still it was a mere chose in action, and therefore, by the rules of common law, was not assignable, and, consequently, could not form any consideration for a promise. The first count of the declaration is, for these reasons, bad; and a general judgment having been entered up for the plaintiff in the court below, it must be reversed.

(a) See 2 Bing. 487.

Talfourd

Talfourd contra. The first count shews a sufficient consideration for the defendant's promise. In *Moulds-dale v. Birchall* (a), the assignment of an uncertain debt was held a sufficient consideration for a promise. In *Davis v. Reyner* (b) it was held that forbearance to sue an executor for a legacy was a good consideration for a promise to pay it, although it was not shewn that the executor had assets. In *Thorpe v. Thorpe* (c), the release of an equity of redemption was considered a good consideration, and Lord *Holt* said that the common law would take notice that the mortgagor had an equity to be relieved in Chancery. So here it must be presumed, after verdict, that the contract for the houses was in writing, and the Court will take notice that the plaintiff below had an interest capable of being enforced in equity.

1823.

Plaintiff
against
Defendant.

ABBOTT C. J. I am of opinion that the judgment of the Court below must be affirmed. The plaintiff, in his declaration, has alleged that he had bargained and agreed with one *J. E.* for the purchase of certain freehold houses. We must take that to mean, that he had made a valid bargain; and, as a writing is essential to the validity of such a bargain, it must after verdict be presumed to have been in writing. The declaration then goes on to state that, in consideration that he (the plaintiff) would sell and give up that bargain to defendant, and suffer him to be the purchaser, defendant promised to pay a certain sum, and that he did sell and give up the bargain to the defendant. If to this transfer

(a) 2 *W. Bl.* 820.(c) 1 *Ld. Raym.* 662.(b) 2 *Lev.* 3.

writing

1825.

 PRICE
 against
 SEAMAN.

writing was necessary, that must now be presumed. Then the declaration states that the defendant did become the purchaser, and did take the said bargain, and obtain to him a conveyance of the houses. Now, the plaintiff having made a contract, and having given it up to the defendant, unless we can say that giving up a contract in consideration of money is contrary to law, I cannot find any objection to the plaintiff's recovery in this action. I am not aware of any rule of law which is contravened by giving up such a contract in consideration of money; the judgment which was given for the plaintiff below must, therefore, be affirmed.

BAYLEY J. It must be taken that the bargain and agreement mentioned in the declaration was an effectual bargain, which it could not be, unless in writing. The only objection upon which I entertained any doubt was, that the assignment of a chose in action was stated as the consideration for the defendant's promise. But such an assignment is not illegal, although the assignee cannot sue upon the contract in his own name. It is a very common practice to assign, amongst other things, debts for the benefit of creditors; that is perfectly legal, although the assignee must sue for them in the name of the assignor.

HOLROYD J. I also am of opinion that the first count of this declaration is good, for the reasons already given. The assignment of a chose in action is not illegal, and *Com. Dig.*, action upon the case upon *assumpsit* (B. 83.) shews it to be a good consideration for a promise.

a promise. The judgment for the plaintiff below must, therefore, be affirmed.

1825.

PRICE
against
SEAMAN.

LITLEDAL J. concurred.

Judgment affirmed. (a)

(a) See *Loder v. Chesleyn*, 1 Sid. 212.

HILL against SAUNDERS (in Error).

THIS was a writ of error from C. P. The declaration was in covenant on an indenture between plaintiff and *Nancy* his wife, now deceased, of the one part, and defendant of the other part, whereby plaintiff and *Nancy* his wife did demise, lease, &c., unto the defendant certain premises habendum for twenty-one years, from *February 2d*, 1816, yielding and paying unto the plaintiff and the said *Nancy* the yearly rent of 24*l.* of lawful money; and defendant thereby covenanted to pay the said rent to plaintiff, and *Nancy* his said wife, now deceased. By virtue of which demise defendant entered, and afterwards and during the said term, and after

Covenant for non-payment of rent, stating that plaintiff and his wife, since deceased, demised certain premises to defendant for years, reddendum to plaintiff and his wife 24*l.* per ann. and a covenant to pay the rent to the plaintiff and his wife. Averment that on, &c., the wife died, and that afterwards, to wit, on, &c., 24*l.* of the rent

aforesaid became due and in arrear to plaintiff. By the lease set out on oyer it appeared that the reddendum was to the husband and wife, and the heirs of the wife, and the covenant to pay rent was in the same form. Plea; that the premises were the estate of the wife, and that the plaintiff had nothing in them but in right of his wife; that on, &c., she died without issue, leaving *J. A.* her heir, whereupon all the estate of the plaintiff ceased, and *J. A.* threatened to enter and eject defendant, unless he attorned, whereby he was compelled to attorn, and become tenant to *J. A.* General demurrer and joinder. Held, that the plea was good, for that some interest having passed by the lease from plaintiff and his wife, it could not work by estoppel, and the defendant was therefore entitled to shew that the plaintiff's interest had ceased, and also that the attornment upon the threat of eviction was tantamount to an entry by the heir.

Semble, that upon the face of the declaration and the deed set out on oyer (which was thereby made part of the declaration) the plaintiff had no right of action; for the covenant was to pay rent to the plaintiff and his wife and her heirs, and the plaintiff shewed the death of his wife, whereupon the rent was payable to her heir.

the

1825.

HILL
against
SAUNDERS.

the death of the said *Nancy*, to wit, on, &c., a large sum of money, to wit, 24*l.*, for one year's rent, became due to the plaintiff. Defendant craved oyer of the indenture, whereby it appeared that the reddendum in the lease was to plaintiff and *Nancy* his wife, *her heirs or assigns*. And the covenant for payment of rent was with plaintiff and *Nancy*, *her heirs and assigns*, to pay the rent to plaintiff and *Nancy* his wife, *her heirs and assigns*. First plea, non est factum. Second, that plaintiff and *Nancy* his wife, before and at the time of making the indenture, were seised in their demesne as of fee, in right of the said *Nancy* only, of the premises in question, and that the plaintiff then had not any thing in the premises, except in right of his wife, and that the wife, after the making the indenture, and before any part of the 24*l.* in the declaration mentioned became due or payable, to wit, on, &c., at, &c., died without issue, so seised, leaving one *J. A.*, her brother and heir at law. Whereupon all the estate which plaintiff had expired, and the said *J. A.* became seised; and being so seised, afterwards, to wit, on, &c., entered and ejected defendant. Third plea, that plaintiff never had any thing in the said demised premises, with the appurtenances, except in right of the said *Nancy*, whose estate the said pieces or parcels of land with the appurtenances in the declaration mentioned, were; and that the said *Nancy*, after the making of the said supposed indenture, and before any part of the said sum of 24*l.* became due and payable, to wit, on, &c., at, &c., died without issue, leaving *J. A.*, her brother and heir at law; whereupon all the estate and interest which the said plaintiff ever had of or in the said demised premises with the appurtenances, altogether expired, ceased and determined;

nor

nor hath he from thence hitherto had, nor has he now, any estate or interest whatever therein. And the said *J. A.*, as such heir as aforesaid, afterwards, to wit, on, &c., at, &c., threatened him, defendant, to eject and evict him from the possession of the said demised premises with the appurtenances, unless defendant would attorn and become tenant, and defendant was then and there forced and obliged to, and did necessarily attorn and become tenant of the same, to the said *J. A.* Demurrer and joinder. In the Court of C. P. judgment on the demurrer was given for the defendant (a), whereupon a writ of error was brought, and general errors assigned.

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HILL
against
SAVINGS.

Taunton for the plaintiff in error. The third plea, upon which judgment was given for the defendant in the court below, does not contain any traversable allegation upon which a material issue could be taken; it is, therefore, bad. Supposing the statement in the third plea to amount to an allegation that the wife had some estate, it does not follow that she had an estate of inheritance, so that her brother and heir would take it, and no traverse could have been taken upon that. [*Holroyd J.* It appears by inference that the wife had such an estate as determined on her death, and that is admitted by the general demurrer, although on special demurrer it might not have been sufficient. *Littledale J.* If it appears that the wife had an estate determining at her death, can the husband sue for rents accruing afterwards?] Yes, for he is a mere stranger; the lessee is in by the wife, and the husband joins only for conformity, *Harvey v. Thomas.* (b) The lease, therefore, works by

(a) See 2 Bing. 112.

(b) Cro. Eliz. 816.

estoppel,

1825.

HILL
 against
 SAUNDERS.

estoppel, and the lessee is bound to pay the rent. [*Holroyd J.* A husband seised in right of his wife has an interest in the land (a).] That is, a defeazible interest only; and in 1 *Ventr.* 358, *Pemberton C. J.* says, "The difference is where the party that makes the estate has a legal estate, and where a defeazible estate only; for in the latter case, a lease may work by estoppel, though an interest passed so long as the estate (out of which the lease was derived) remained undefeated." In *Dixon v. Harrison (b)*, there is this passage: "To this purpose there is a case. If a man be seised of land jure uxoris, and leaseth the land for years, reserving rent, his wife dies without having had any issue by him, whereby he is no tenant by the courtesy, but his estate is determined, yet he may avow for the rent before the heir hath made his actual entry. This case is not adjudged, but it is much the better opinion of the book;" and the year-book 9 *H. 6. f. 43.* is cited, and the same passage is cited in *Bro. Abr. Avowry*, pl. 123. Now that must mean rent accruing after the death of the wife; for, at common law, a distress for rent could not be made after the determination of the estate in respect of which it became due. [*Littledale J.* The covenant in the lease is to pay rent to the husband and wife, and the heirs of the wife; that shews that the husband's interest ceased on the death of his wife, and the declaration shewing that the wife was dead when the rent became due, shews that the husband has no right of action.] The covenant in question might be strong evidence before a jury upon an enquiry whether the estate were the wife's, but is not sufficiently certain to determine the question on the re-

(2) See *Blake v. Foster*, 8 T. R. 467. (b) *Vaugh.* 46.

cord;

cord; and if it be not clear that the whole estate was the wife's, then the husband is entitled to sue, as the survivor of two joint covenantees, *Anderton v. Martindale*. (a) The judgment of the Court below proceeded on the supposed existence of two circumstances which do not appear on the record; first, that the wife was seised in fee; secondly, that the lease was good under the 32 H. 8. c. 28. Now the third plea no where states that the wife was seised in fee; and if it did, still there is not any thing to shew that the lease would be good within the statute, for it does not appear that the lands had been accustomedly letten for twenty years before the lease, nor that the accustomed rent was reserved.

1625.

HILL
against
SAUNDERS.

E. Lowe contra was stopped by the Court.

ABBOTT C. J. I am of opinion that the judgment of the Court of Common Pleas was right. This is an action of covenant for non-payment of rent. The plaintiff, in his declaration, alleges that he and his wife *demised*. He takes upon himself to set forth the legal effect of the indenture; and, therefore, as against him, it must be taken that his wife had some interest in the premises. He then sets out the reddendum, and a covenant to pay the rent; but those being stated imperfectly, the defendant sets out the whole deed on oyer. In the declaration there is an averment of the death of the wife, and the conclusion of it alleges that the rent in question, after the death of the wife, became due to the plaintiff, and still is in arrear and unpaid to him. The deed, when set out on oyer, is to be considered as forming a part of the declaration, and we thereby see that the lease was

(a) 1 *East*, 497.

1825.

HILL
 against
 SAUNDERS.

made by the husband and wife, and the reddendum and covenant to pay rent are in these words: "Yielding and paying, therefore, yearly and every year during the said term, unto the said *J. Hill* and *Nancy* his wife, *her heirs or assigns*, the rent or sum of 24l." "And the said *J. Saunders* doth hereby covenant to and with *J. Hill*, and *Nancy* his wife, *her heirs and assigns*, that he the said *J. Saunders* will pay unto the said *J. Hill* and *Nancy* his wife, *her heirs or assigns*, the said rent." The defendant by executing this deed estopped himself from saying that no interest passed, but he may, nevertheless, aver, that it has been put an end to. Upon the face of the declaration, I should have had great difficulty in saying that the plaintiff could recover, because the lease is framed upon an intent, that on the death of the wife, the rent should be paid to her heirs. There is no covenant by the defendant to pay rent to the husband after the wife's death. But passing that by, as a point upon which it is unnecessary to give any decided opinion, the question is, whether the third plea in substance shews sufficient matter to defeat the plaintiff's action. That plea alleges, that the plaintiff never had any thing in the demised premises, except in right of his wife, whose estate the said parcels of land in the declaration mentioned were. I consider that as an allegation of two matters, and as it is immaterial in what order they are alleged, they may be transposed, and then the plea will run thus: "That the parcels of land in the declaration mentioned were the estate of *Nancy* the plaintiff's wife, and that he never had any thing in the premises, except in right of the said *Nancy*." The plea then avers, that before any part of the rent in question became due, the wife died without having had
 issue,

issue, whereupon all the estate and interest which the plaintiff ever had of or in the premises, altogether expired, ceased, and determined. Surely those facts are averred with sufficient certainty to enable the plaintiff to take issue upon any of them. He might have replied, that the estate was not the wife's, or that the plaintiff had an interest beyond her life, or that his estate did not cease on her death. The plea is certainly informal, but I think, that in substance and effect it is good as a bar to the claim set out in this declaration; the judgment of the Court below must, therefore, be affirmed.

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against
SAUNDERS.

BAYLEY J. The judgment in favor of the defendant may be supported, without assuming either that the wife was seised in fee, or that the lease was good by virtue of the statute 32 H. 8. c. 28. The declaration, which professes to state the legal effect of the lease, alleges that the plaintiff and his wife demised; the wife, therefore, must have had some estate, and either that would be her separate estate, or she and her husband would be joint tenants. The plea shews that there was not a joint tenancy, the estate of the husband, therefore, must have been in right of the wife only. Common sense then shews that the husband can have no right to the rent, which became due after his wife's death. If, in this case, the plaintiff could say that his interest continued after his wife's death, the same might have been done in *Blake v. Foster* (a), but there the opinion of the Court was against such a claim. And that case, at all events, proves that the defendant was at liberty to shew that his lessor

(a) 8 T. R. 487.

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against
SAUNDERS.

had a limited interest, and that it had expired before any breach of covenant was committed.

HOLROYD J. I also think that the judgment of the Court of Common Pleas was right. Upon this declaration, which is not drawn with a *testatum existit*, it is alleged that the husband and wife demised. It must therefore be taken to be an indenture operating as a *demise* by the two, which it could not unless the wife had an interest, for although without such interest it might work by estoppel, yet it would not be a *demise* by her. The husband, too, had such an interest as would make it a *demise* by him. A guardian in socage may demise, and a lease by him may be so pleaded, although the term moves out of the seisin of the infant. This being the case, it appears to me that the plea contains material traversable matter, although not formally pleaded. It states that the estate of the plaintiff determined on the death of the wife, and afterwards there is an allegation of entry by the heir. Those are issuable facts, and are admitted by the demurrer. It is to be observed that the defendant is a stranger to the lessor's interest, and may therefore shew generally that it is at an end, in the same manner as a lessor may state generally that a lease by various mesne assignments is vested in an assignee, whereas the assignee must state all the assignments particularly. (a) But then it is said that the lease was only voidable, and that the husband was entitled to rent until the entry of the heir, and a passage from *Vaughan's Reports* was cited. But it seems to me that the plea discloses that which was equivalent to an entry by the

(a) 1 *Saund.* 112 a. (1).

heir,

heir, for it states that the heir threatened to evict the defendant, and that he was obliged to attorn, in order to prevent it. These reasons satisfy me that the plea in question is in substance good as a bar to the action, and that the defendant is entitled to judgment on the demurrer.

1825.

HILL
against
SAUNDERS.

LITLEDALE J. I am of the same opinion. It appears by the lease as set out on oyer that the defendant covenanted to pay rent to the heirs of the wife after her death. The defendant pleads that the wife died before the rent sought to be recovered became due, and that the plaintiff's interest then ceased; it also shews a claim of the rent by the heir, which is tantamount to an eviction by him. Unless, therefore, the plaintiff can avail himself of some technical rule of law, he cannot maintain this action; and it has been contended for him, that this being a covenant with the husband and wife, it goes to the survivor, and that the defendant is estopped by the deed. The plea furnishes a sufficient answer. It is shewn by the indenture that the wife had some interest, and the plea avers that she had the whole interest. If so, it truly avers that upon her death the interest of the husband ceased, and the defendant is not estopped from shewing that. The general demurrer admits the facts alleged in the plea, and taking them to be true, the plaintiff has no right of action.

Judgment affirmed.

1825.

WARRE *against* MILLER (in Error).

Assumpsit on a policy of insurance on freight of a ship at and from *Grenada* to *London*. It was proved that there is only one custom-house for the whole island of *Grenada*, that the vessel arrived in safety at *Grenada* and discharged part of her outward cargo at three different bays, and she was proceeding to a fourth to discharge the residue of her outward cargo and take in part of her homeward cargo, when she was lost by perils of the sea: Held, that the vessel at the time of the loss was proceeding to this fourth bay for a purpose connected with the voyage insured, and consequently that it was no deviation, and the underwriter was liable.

ASSUMPSIT on a policy of insurance on freight upon the ship *Aurora*, at and from *Grenada* to *London*, with leave to call at all or any of the *West India* islands (*Jamaica* and *St. Domingo* excepted), warranted to sail from *Grenada* on or before the 1st of *August* 1823, and it was agreed that it should be lawful for the said ship in that voyage to proceed and sail to and touch and stay at any ports or places whatsoever and wheresoever, with liberty to load and unload goods wherever she might touch, without being deemed any deviation, and without prejudice to that insurance. The declaration then averred that the defendant subscribed the policy, and that the ship, to wit, on, &c., was in good safety at *Grenada*, and that divers goods and merchandizes were then and there loaded on board her, to be carried therein, on and for freight on the said voyage; and the master of the said ship had then and there entered into certain contracts and agreements with divers persons, whereby they had contracted and agreed with him to load other goods on board the said ship to be carried on freight on the said voyage; which last-mentioned goods were then and there ready to be loaded. The interest of the plaintiff and the loss of the ship by perils of the sea were then stated. Plea, the general issue. At the trial before *Park J.* at the *London* sittings after *Hilary* term, 1824, it was proved that the defendant subscribed the policy, and that the plaintiff

plaintiff was owner of the ship *Aurora*. That she sailed on her outward voyage on the 10th of *December* 1822, and arrived at *Grenada* on the 16th of *January* 1823, having taken out supplies for several estates in *Grenada*. The ship went first to *Grand Male Bay* in *Grenada*, anchored there, and remained 48 hours, and delivered part of the supplies there; she then went to *Duquesne's Bay* in *Grenada*, and delivered another part of the outward cargo, and remained there about three days. She next proceeded to *Irwin's Bay* in *Grenada*, and arrived there about the 22d of *January*, and delivered there part of the supplies for some estates in that neighbourhood. The ship quitted *Irwin's Bay* on the 3d of *February*, and proceeded towards *Grenville Bay*, in *Grenada*, for the purpose of delivering the remaining part of the outward cargo, about one-eighth, and to take in a part of her homeward cargo, but was lost by perils of the sea while going into *Grenville Bay*. There is only one custom-house in *Grenada* for all the different Bays. Before the captain sailed for *Grenville Bay* he had made engagements with several persons for homeward cargo, amounting to very nearly a full cargo. Upon this evidence it was contended for the defendant that there had been a deviation from the voyage insured, and the learned judge was requested so to direct the jury; but he was of opinion that there had not been a deviation, and directed the jury to find for the plaintiff if they thought that positive contracts for homeward cargo had been made by the master. The jury found that the ship at the time of the loss was going to *Grenville Bay* for the double purpose of delivering the remaining part of her outward cargo, and to take in her homeward cargo,

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 WARR
 against
 MILLER.

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and gave their verdict for the plaintiff. A bill of exceptions was thereupon tendered to the learned judge and sealed by him; and a writ of error brought, whereupon the common errors were assigned.

Taddy Serjt. for the plaintiff in error. The point for the opinion of the Court is, whether the ship at the time of the loss was within the risks insured, and that depends upon two questions; first, whether the risk had ever attached, and, secondly, whether there had been a deviation. [*Abbott C. J.* The first point was not disputed at the trial, and the learned Judge was not requested to give any direction to the jury upon it.] Then the defendant must now rely upon the deviation, of which the captain certainly had been guilty, unless at the time of the loss the ship was doing that which was connected with the purposes of the voyage insured only. *Solly v. Whitmore* (a), is a strong authority upon this point; there a ship was insured at and from *Hull* to the port or ports of loading in the *Baltic* or *Gulf of Finland*, with liberty to touch and stay at any ports or places whatsoever for all purposes, without being deemed a deviation. *Pillau* was the intended port of loading, but the vessel touched at *Elsinore* and *Dantzic* to unload goods, and was afterwards lost by the perils of the sea before she arrived at *Pillau*; and it was held that the liberty to touch and stay at any ports or places was confined to touching for the purposes of the voyage insured; and, therefore, as the unloading of goods at *Elsinore* and *Dantzic* was unconnected with the purposes of that

(a) 5 B. & A. 45.

voyage, touching at those places for that purpose was a deviation. So here the unloading of goods at *Grenville Bay* was quite unconnected with the purposes of the voyage insured. This policy was to protect the ship whilst preparing for her homeward voyage, and during that voyage. To be within the protection of the policy the ship must be employed on the purposes of the voyage insured only, otherwise the risk of the underwriters may be indefinitely extended. The captain had no right to mix up together the two objects of delivering the outward and loading the homeward cargo at *Grenville Bay*, *Inglis v. Vaux*. (a) Nor can any inconvenience or hardship arise from such a decision, because the case may in future be provided for by a special liberty in the policy. [Littleale J. The case of *Inglis v. Vaux* differs materially from this. The voyage was made of longer duration by the stay at *Antigua*; here the policy attached as soon as the ship was in good safety at *Grenada*, and the captain might remain there as long as he pleased, provided he complied with the warranty to sail before a particular day.] The learned Judge at nisi prius decided this case upon the authority of *Camden v. Cowley* (b), but that case would not, as to many particulars, be now supported. The custom of merchants was inquired into, to ascertain when the outward policy determined, and it was held that a policy at and from a foreign port commenced when the outward policy ended. In the present case it is clear that if the vessel had gone to *Grenville Bay* for the sole purpose of delivering the outward cargo, it would have

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(a) 3 Campb. 437.

(b) 1 W. Bl. 417.

been

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been a deviation, on account of the delay thereby sustained; but the delay is equally great, although in addition to that purpose the captain had the further object of taking in part of the homeward cargo. In *Motteur v. The London Assurance Company* (a), Lord Hardwick said; that a policy at and from a foreign port attached on the first arrival there, but in *Chitty v. Selwyn* (b) that dictum is thus qualified: "Where a ship is insured at and from a place, and it arrives at that place, *as long as the ship is preparing for the voyage upon which it is insured*, the insurer is liable." Here the ship was not at the time of the loss employed in preparing for the voyage insured, the underwriter is therefore discharged.

Campbell contra. If the ship in question had been going to *Grenville Bay* for the sole purpose of delivering her outward cargo, she would have been protected by this policy; but as she was going there for the double purpose of delivering her outward and taking in her homeward cargo, a fortiori, she was protected. The effect of the policy was to take up the ship, as soon as she arrived in safety at the outward port, and protect her, whilst pursuing the legitimate objects of the adventure, until she arrived in *Great Britain*. *Grenada* has only one custom-house, and is, in law, all one port; therefore, going from bay to bay, for the purpose of delivering the outward cargo, was the same as going from quay to quay in one large harbour. The policy attached upon her safe arrival at the first bay. Had she proceeded to discharge the whole cargo there, and been

(a) 1 Atk. 545.

(b) 2 Atk. 359.

lost whilst that process was going on, she would clearly have been protected; and if *Grenada* is to be considered all one port, it can make no difference that she delivered her cargo at various places or bays in that port. *Camden v. Cowley* decided that the ship would have been protected, had the delivery of the outward cargo been the sole object of going to *Grenville Bay*; and there is nothing in that case which would not now be supported. The ship was there insured "at and from *Jamaica* to *London*;" she had been anchored in good safety in one port at *Jamaica*, and was afterwards lost in coasting the island, for which no purpose is stated, except the delivery of the outward cargo, and the underwriters were held liable. There was a policy on the ship to *Jamaica*, and the determination of that risk was properly looked to, in order to ascertain when, in the understanding of the parties, the ship was to be considered as *at Jamaica*; for as soon as she was *at Jamaica*, the homeward bound policy was to attach, and having attached, the Court held that it was not discharged by the subsequent coasting for the purpose of delivering the outward cargo. In *Barras v. London Assurance Company (a)*, also, it was held, that the outward risk determined on the first arrival. *Solly v. Whitmore* was decided on the ground that the vessel touched at *Elsinore* and *Dantzic*, for purposes wholly unconnected with the voyage insured. So in *Inglis v. Vaux* the captain remained at *Antigua*, not to deliver his cargo, but to dispose of it, and to seek a homeward cargo, not merely to take it on board. But in this case the ship was going to *Grenville Bay*, to take in as well as to deliver cargo; part of the homeward

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 against
 MILLER.
(a) *Marsh Ins.* 266. 1 *Park Ins.* 64.

cargo

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cargo was prepared there, and no delay was occasioned. At all events, there was one legitimate object of going there; it is, therefore, incumbent on the defendant to make out that actual delay was sustained by the execution of some other purpose. This may be illustrated by the cases relating to trading, under policies giving liberty to touch and stay at ports in the course of a voyage. It was formerly held that trading in any port avoided the policy; but in *Raine v. Bell* (a), and several later cases (b), it was held, that such trading did not vitiate the policy, if it could be done without delay or otherwise increasing the risk of the underwriter.

Taddy Serjt. in reply. In *Raine v. Bell*, and the other cases of that description, there was a special finding that no delay had been occasioned. Here, the intention to deliver cargo at *Grenville Bay* raised a presumption that delay would be occasioned, and the plaintiff was bound to rebut that presumption by evidence, but failed to do so.

ABBOTT C. J. I am of opinion that the direction given by the learned Judge to the jury was perfectly correct. The single point for our consideration is, whether there was any deviation from the voyage insured, that being at and from *Grenada to London*. That includes all purposes which are preparatory to the commencement of the homeward-bound voyage, according to the usual course of the trade in which the ship was engaged. It was not dis-

(a) 9 East, 195.

12 East, 131. *Elliott v. Wilson*;

(b) See *Cormack v. Gladstone*, 7 Br. P. C. 459. *Urquhart v. Barr*, 11 East, 347. *Laroche v. Oswin*, *nard*, 1 Taunt. 450.

puted at the trial that the policy had attached; and, therefore, it must now be taken that, as far as time was concerned, the ship was within the policy; and the only ground for saying that she was out of its protection at the time of the loss is, that she was then employed for a purpose foreign to the voyage insured. Whether there is any port, properly so called, in *Grenada*, does not appear; but it is stated that there is only one custom-house for the whole island. Now, taking into consideration that ships going out to bring home produce from the *West India* islands usually take out supplies for several different estates, and that they deliver them and take in their homeward cargo at various places on the coast, I think that *Grenada* must be considered as all one place, as was properly contended in argument; and as the outward cargo must be delivered before the homeward can be taken in, that is a necessary preparation for the homeward voyage. This insurance, then, being at and from *Grenada* to *London*, it seems to me that the employment in which the ship was engaged at the time of the loss was connected with the homeward voyage, and not foreign to it, and was, consequently, a part of the risk which the underwriter had taken upon himself. For these reasons I am of opinion that the judgment of the Court below must be affirmed.

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 WARREN
 against
 MILLER.

BAYLEY J. I am of opinion that the policy which is admitted to have attached was not discharged by a deviation. According to the common course of proceeding at all the *West India* islands, stores are taken out for various

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 against
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various estates, and the homeward cargo is taken in from them. The outward cargo is, therefore, usually delivered and the homeward taken in, at places on the coast, near those estates. In the present case, it appears that the ship had been at three places in *Grenada* to discharge part of her outward cargo, and was proceeding to a fourth with the residue of it still on board; and that is said to be a deviation. But I think that the going to *Grenville Bay* was necessarily connected with the voyage insured; for the vessel, when discharging cargo there, would have been in a state of preparation for the homeward voyage. *Solly v. Whitmore* was a very different case from this: there the insurance was from *Hull* to the port of loading, *Pillau*, and the going to *Elsinore* and *Dantzic* was not at all connected with the purposes of the voyage insured. *Inglis v. Vaux* is also very distinguishable. During the long stay of the captain at *Antigua*, he was not occupied in delivering the outward cargo, but in attempting to dispose of it, and procure a homeward cargo. The cases of *Forbes v. Aspinall* (a), and *Forbes v. Cowie* (b), throw some light upon this question. They were upon an insurance of freight upon the ship *Chiswick*, at and from any port or ports in *Hayti* to *Liverpool*. The ship, after unloading part of the outward, and taking in a portion of the homeward cargo at one port, proceeded to another, to discharge the rest of the outward cargo; but before that was done, she was lost by the perils of the sea. The question discussed was, what amount of damages the

(a) 13 East, 323. (b) 1 Campb, 520. Park on Ins. 60.

assured

assured were entitled to claim from the underwriters ; and it would have been a very short answer to the whole case that the policy was discharged by a deviation ; but the point was never urged. In like manner I think, in the present case, it cannot be said that the going to *Grenville Bay*, for the double purpose of discharging and taking in cargo was a deviation. The plaintiff is, therefore, entitled to recover, and the judgment of the Court below was right.

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 WARRS
 against
 MILLER.

HOLROYD and LITLEDALE Js. concurred.

Judgment affirmed.

CARR *against* HINCHLIFF.

INDEBITATUS assumpsit for goods sold and delivered. Pleas first general issue ; secondly, action non, because the said goods, &c., were with the knowledge, privity, and consent of the plaintiff, so sold and delivered to the defendant by one *John Summers*, being then and there the agent and factor of and for the plaintiff, in his the said *John Summers'* own name, as the true and sole owner thereof, and as and for his the said *J. S.*'s own proper goods, wares, and merchandizes ; and that the plaintiff did not appear, nor was he known by the de-

Assumpsit for goods sold and delivered. Pleas, that the goods were sold and delivered to defendant by *A.* the factor and agent of plaintiff, with the privity of plaintiff, as and for the goods of *A.*, and that defendant did not know that the goods were not the property of *A.* ; that at the

time of the sale and delivery, *A.* was and still is indebted to defendant in more than the value of the goods, and that defendant is ready and willing to set off and allow to plaintiff the value of the goods, out of the monies so due and owing from *A.* ; Held, on special demurrer, that the plea was good.

defendant,

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against
HINCHLIFF.

defendant, at or before the time of the said sale and delivery of the said goods, wares, and merchandizes, to the defendant as the proprietor of the same, or that he the plaintiff was in anywise interested therein; and the defendant further says, that he then and there bought and accepted, and received the said goods, wares, and merchandizes, of and from the said *J. S.* as the proper goods, wares, and merchandizes, of him *J. S.*, and that credit for the said goods, wares, and merchandizes was given to the defendant by *J. S.*, and not by the plaintiff; and the defendant further says, that *J. S.*, before and at the time of the sale or delivery of the said goods, wares, and merchandizes, and thence continually hitherto, to wit, at, &c., was and still is indebted to him the defendant, in a large sum of money; to wit, the sum of 600*l.*, of lawful money, for money before then paid by the defendant for the said *J. S.*, at his special instance and request, and for other money before then had and received by the said *J. S.*, for the use of the defendant, and for other money wherein the said *J. S.* was found to be in arrear and indebted to the defendant upon an account stated between them; which said sum of money so due and owing from the said *J. S.* to the defendant as aforesaid, exceeds the sums of money due and owing from the defendant to the plaintiff upon and by virtue of the causes of action in the declaration mentioned, and out of which said sum of money so due and owing from the said *J. S.* to the defendant as aforesaid, he the defendant is ready and willing, and hereby offers to set off and allow to the plaintiff, the full amount of the said sums of money due and owing from the said defendant to the said plaintiff, upon and by virtue of the causes of action in the said declaration mentioned, *according to the*

the form of the statute in such case made and provided, and this be the said defendant is ready to verify. Similitez to general issue and special demurrer to the second plea assigning for causes that it amounts only to the general issue, and also that the several sums of money set forth in that plea, and therein alleged to be due, and owing by Summers to the defendant, and out of which the defendant offers to set off and allow to the plaintiff the full amount of the said sums of money due and owing from the defendant to the plaintiff upon and by virtue of the causes of action in the declaration mentioned, are not, nor are any of them mutual, according to the form of the statute, and also that the second plea is multifarious, and no certain or complete issue can be taken upon it. Joinder in demurrer.

1825.

Case
against
Hemling.

Milner in support of the demurrer. The defendant's special plea is bad for the causes of demurrer assigned. In cases of this sort, it is necessary for the defendant to prove two things; first, that the purchaser of the goods was ignorant that any person but the factor was the owner; and, secondly, the amount of the debt due from the factor. By this plea the defendant attempts to get rid of that burthen of proof; for the plaintiff, if the plea be good, must take issue upon one of those points, and admit the other as stated. There is no instance in the books where such a plea has been pleaded, and all the facts which could be given in evidence under it would be admissible under the general issue. In *George v. Clagett* (a), and *Rabone v. Williams* (b), the evidence

(a) 7 T. R. 359.

(b) 7 T. R. 360. n.

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against
HANCHLIFF.

was given under the general issue, and this plea, in fact, amounts to nothing else; for, under the circumstances detailed in it, the sale of the goods by the factor cannot be considered as a sale by the plaintiff, and never created a debt due to him. *Boot v. Wilson (a)*, shews, that a special plea amounting to the general issue is bad. Secondly, the debt from the factor to the defendant cannot be set off by way of plea, for it is not a mutual debt within the terms of the statute.

Tindal contra. A special plea, amounting only to the general issue is good, provided it confesses and avoids the plaintiff's cause of action, or if it contains matter of law. Now this plea does confess and avoid; for, first, it admits that the defendant purchased the plaintiff's goods through the medium of an agent, whereby a debt would arise: and then it avoids, by shewing a debt due from the agent to the defendant. *George v. Clagett*, and *Rabone v. Williams*, shew the law to be that such a debt may be set off. And if such be the law, the defendant should be allowed to plead it, for pleading is the language of the law, and this plea contains merely that which in the cases cited was held to be the law. In *Hatton v. Morse (b)*, it was held that a defendant might, to an action of assumpsit, plead payment, although it amounts to the general issue, because it admitted the assumpsit, and the same appears by Com. Dig. *Pleader (E. 14)*. In *Winch v. Keeley (c)*, two cases, *Bottomley v. Brooke*, and *Rudge v. Birch*, are cited, in which pleas similar to the present were held good on demurrer.

(a) 8 East, 311.

(b) 1 Salk. 394.

(c) 1 T. R. 619.

Milner in reply. Where a factor with the permission of the true owner sells goods in his own name, as and for his own goods, and is at the time of the sale indebted to the purchaser in a larger amount than the value of the goods so sold, that sale does not give any right of action to the principal. The plea in question states a sale of that description; it does not, therefore, confess and avoid any right of action in the present plaintiff, but in effect denies that he ever had one. Neither can it be treated as a plea of matter of law; a plea of set-off is a bar by virtue of the statute, but that only authorizes the setting off mutual debts, and these debts not being of that nature, the defendant ought not to have pleaded the agent's debt as a bar *by virtue of the statute* which is the form of his plea.

1825.

CARR
against
HITCHCOCK.

BAYLEY J. Two special causes of demurrer to the plea in question have been assigned. First, that it amounts to the general issue only. Secondly, that the debts are not mutual; and, therefore, not within the statute of set-off. There is no doubt that the debts are not mutual, unless the factor may for this purpose be identified with the principal; but the cases of *George v. Clagett*, and *Baring v. Corrie* (a), shew that they may be so identified; that objection, therefore, falls to the ground. The other question is, whether the defendant was bound to give this matter in evidence under the general issue, instead of pleading it specially. In the cases cited, that course was adopted. But there are instances in which a defendant has the option of giving his defence in evidence under the general issue, or of

(a) 2 B. & A. 137.

1825.

CASE
against
Harcourt.

putting it on the record. One of those is where the plaintiff's right of action is confessed and avoided by matter ex post facto; ex gr. by a plea of payment, as in *Brown v. Oornish* (a), and *Vanhatton v. Morse* (b), or accord and satisfaction as in *Paramore v. Johnson* (c), where the reason is assigned, viz. that it gives color to the plaintiff. The other instance is, where the plea does not deny the declaration, but answers it by matter of law. Thus in *Hussey v. Jacob* (d), which was an action against the acceptor of a bill of exchange, the defendant pleaded, that it was given for money lost at play and, therefore, void by the 16 Car. 2. c. 7.; plaintiff demurred, and one objection taken was that the plea amounted to the general issue; but it was held that the plea not consisting of bare matter of fact, but being intermixed with matter of law, the defendant might plead it specially, for otherwise he would be obliged to commit a point of law to the jury. Is this plea then a confession and avoidance by matter ex post facto? It admits a sale to the defendant by the plaintiff's factor; that at common law gives a right of action to the plaintiff, and it is only upon a legal principle deduced from the statute of set-off, that the defence arises. But the defendant may not choose to insist upon that defence, and it is by matter ex post facto, viz. insisting upon the set-off, that the right of the plaintiff is destroyed. The plea is, therefore, good upon the principle that the plea confesses a right of action, and then avoids it by matter ex post facto. I am also of opinion, that the plea is good as being matter of law. It is not a negation of the facts in the declaration, but

(a) 1 *Ld. Raym.* 217.

(b) 2 *Ld. Raym.* 787.

(c) 1 *Ld. Raym.* 566.

(d) 1 *Ld. Raym.* 87.

matter

matter of legal defence arising out of the statute of set-off. It is as much matter of law, as coverture, or infancy, which are put as illustrations of this point, in the case of *Hussey v. Jacob*, to which I before adverted. It has been urged, that the plea imposes a hardship upon the plaintiff, as it compels him to admit one half of the defendants' case; supposing it to be so, that cannot be adopted by the Court as a ground for saying that the plea is bad: but I am not prepared to say that the plaintiff might not have framed his replication so as to put in issue, both the sale by the factor as alleged in the plea, and the debt stated to be due from him to the defendant. Those two facts constitute one matter of defence, and the replication suggested might probably be supported by the cases of *Robinson v. Baley* (a), and *O'Brien v. Saxon* (b). But upon this point, it is unnecessary, and I do not profess to give any decided opinion.

1825.

 CASE
 against
 HARCOURT.

HOLROYD J. I entertained considerable doubts during the argument of this case, but am now satisfied that the plea is good, and an answer to the action. Considering this case upon principles of law, as they stood before the statute of set-off, and taking the contract to have been made as stated in the plea, either the plaintiff or *Summers* might have brought an action for the price of the goods sold, and the circumstances detailed in the plea would have been no defence. But by that statute, when there are mutual debts between a plaintiff and defendant, the latter may set off the debt due to him against that which is claimed. The statute gives him a right to say, that the debt claimed is paid by that which is due to

(a) 1. Burr. 316.

(b) 2 B. & C. 908.

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CARR
against
HINCHLIFF.

him, and that it operates as an extinguishment of the debt. And now, by analogy to the defence given by the statute, a defendant is also entitled to say that his debt is extinguished by another debt due to him from any person who may be identified with the plaintiff. If he is entitled to say that the debt is extinguished, that puts an end to the objection that this plea amounts only to the general issue. If the plea alleged that there never was a debt, it would amount to the general issue; but it admits a debt, which is only extinguished by the counter debt, at the election of the defendant; it, therefore, confesses and avoids the plaintiff's cause of action, and is a good plea.

LITLEDALE J. The facts alleged in the defendant's special plea might have been given in evidence under the general issue, and would in that way have been a good defence to the action, but the question is, whether the same facts stated on the record do or do not constitute a good plea. The plea does not deny the plaintiff's right of action; on the contrary, it admits a *prima facie* right (which in trespass would be called giving colour) and then avoids it by shewing a debt of a larger amount due to the defendant from the plaintiff's agent and factor. The same facts shew the plea to be matter of law, for the action is defeated by the legal right to set up the agent's debt as an extinguishment of that due to the plaintiff. Perhaps the conclusion of the plea whereby the defendant offers to set off and allow the plaintiff the amount of the sum claimed, out of that which is due from the factor, *according to the form of the statute*, may not be quite correct in form, the set-off, in this case, not being strictly according to the statute; but, at all events, that objection could only be taken on special demurrer, and

and has not been assigned as one of the plaintiff's causes of demurrer. For these reasons I agree that judgment on the demurrer must be for the defendant.

1825.

CARR
against
HINCHLIFF.

Milner then prayed for leave to amend, which the Court granted, as the question was proper for argument; although it is contrary to the usual practice to allow amendments after argument.

FARNWORTH and OTHERS *against* THE BISHOP OF
CHESTER, HODGKINSON, Clerk, and BIRKETT,
Clerk.

DECLARATION in quare impedit. The first count stated that *Adam Mort*, on the 19th May 1630, had founded, at his own expence, a certain chapel

In a declaration
in quare impe-
dit the right of
presentation to
a perpetual
curacy was

stated to be "in all the householders' and heads of families in a township and the heirs male of *A. M.*'s body, and such other of his kindred or blood as should have any lands in the township, or the greater number of them," and it was averred that the chapel being vacant one *B.* was duly nominated and elected minister by the plaintiffs being the greater number of the householders and heads of families in the township to whom the nomination and election of the minister then belonged: Held, after verdict, that the declaration was bad, inasmuch as it did not state that the heirs male of *A. M.*'s body, and such other of his kindred or blood as had lands in the township concurred in the nomination, or that they were in the minority, or that there were no such persons.

In 1631, *A. M.* founded a chapel of ease, and endowed it with lands for the maintenance of a minister, and by his will directed that his son should during his life have the nomination and election of the minister, and might by will or deed set down the order or course for the nomination and election of the minister after his death; and if he should not set down any course or order, then the minister should be nominated and elected by all the householders and heads of families in the township, and the heirs male of *A. M.*'s body, and such other of his kindred or blood as should have any land in the township, or the greater number of them. By the instrument of consecration all tithes, fees, and emoluments whatsoever on burials, marriages, &c. were reserved to the vicar of the parish. The son not having set down any order or course: Held, that the householders and heads of families in *Astley* had no right to present a curate to this chapel without the consent of the vicar.

It is a general rule of law, that where a chapel of ease has been erected within the time of legal memory, the incumbent of the mother church is entitled to the nomination of the minister, unless there has been a special agreement to the contrary, to which the parson, patron, and ordinary are parties. Per *Abbott C. J.*

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or house for the public worship of God, on certain land, of him the said *A. Mort*, situate and being in the township of *Astley*, in the parish of *Leigh*, in the county of *Lancaster*: and that by his will, reciting, amongst other things, that he, the said *A. Mort*, had built a chapel or house for the public worship and service of God, in *Astley* aforesaid, it being a place far remote from any church, and the inhabitants very ignorant of good things, and that it was his, the said *A. Mort's*, purpose, to make some provision towards the maintenance of a preaching minister in the said township of *Astley*, he devised and bequeathed to the trustees therein named, their heirs and assigns for ever, certain land, whereof he was seised in fee, upon trust, after his decease, to apply the profits of the land towards the maintenance of a preaching minister, &c., and upon this further trust, that his son, *T. Mort*, should, during his life, have the nomination and election, and likewise power and authority of displacing and removing, as he should see cause, the said preaching minister, and likewise might, by his last will or other his deed, in his lifetime, set down the order or course for the nomination and election, displacing, and removing of the said preaching minister after his death, and that the same course and order should be from time to time forever observed and kept; and if it should happen that he, the said *T. Mort*, should not set down any course or order for the same as aforesaid, then the same preaching minister should be nominated, and elected, and displaced, and removed as occasion should be, from time to time, by *all the householders, or heads of families in Astley, and the heirs male of his the said A. Mort's body, and such other of his kindred or blood as should have any lands in Astley, or the greater number of them, with the advice*

of

of some godly ministers near adjoining; and that the voice of such person as for the time being should be the heir-male of his, *A. Mort's*, body should be considered as equal to six of the other voices, in the election and removal of the said minister. The declaration then averred that *A. Mort* died seised of the land, &c., and that on the 3d of *August* 1631, the chapel was consecrated by the then bishop of *Chester* to divine worship, for the use of the inhabitants of *Astley*, both then and thereafter; provided that all and singular the ministers, or priests, to serve from time to time in the chapel, should be first examined, licensed, and admitted by the bishop and his successors; and that on the 1st of *January* 1632, *T. Mort* died, without having by his will, or any deed in his lifetime, set down any course or order for the nomination and election of the minister of the chapel after his decease; whereupon the nomination and election of the minister belonged to all the householders, or heads of families, in *Astley* aforesaid, and the heirs male of the said *A. Mort's* body, and such other of *A. Mort's* kindred or blood as should have any lands in *Astley* aforesaid, or the greater number of them, with the advice of some godly ministers near adjoining the township of *Astley*. It was then averred that the following ministers were nominated and elected by the greater number of the householders and heads of families in *Astley*, and the heir male of the body of *A. Mort*, or such other of his kindred in blood as then had lands in *Astley*, to whom the nomination and election of the same minister then belonged, with the advice of certain godly ministers near adjoining the said township of *Astley*, and were duly licensed, examined, and admitted by the bishop; viz. on the 18th of *October*, 1716, *Barratt*, clerk;

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clerk ; on the 20th of *August* 1728, *James Marsh*, clerk ; on the 26th *February* 1731, *Thomas Mawdsly*, clerk ; and that on the 11th *June* 1760, the old chapel was taken down, and another erected in lieu thereof, and consecrated ; that on the 23d *February* 1769, *Tillotson* was duly nominated and elected minister of the last-mentioned chapel, by the greater number of the then householders and heads of families in *Astley*, and the heirs male of *A. Mort*, and such other of his kindred or blood as then had lands in *Astley*, to whom the nomination and election of the same minister then belonged, with the advice of certain godly ministers near adjoining *Astley* ; and that *Tillotson* was presented to the bishop to be examined, licensed, and admitted ; but that *John Barlow*, the vicar of *Leigh*, and divers land-owners and inhabitants of *Astley*, *usurping upon the greater number of the householders and heads of families in Astley, and the heir male of A. Mort, and such other of the kindred or blood as then had lands in Astley*, nominated and elected one *R. Barker* as minister, who was thereupon presented to and examined, licensed, and admitted by the bishop ; that on the 29th *April* 1822, the chapel being then vacant by the death of *Barker*, one *E. Bowman* was duly nominated and elected minister of the last-mentioned chapel by the plaintiffs, *they the plaintiffs then and there being the greater number of the then householders and heads of families in Astley, to whom the nomination and election of the same minister then belonged*, with the advice of certain godly ministers near adjoining the township of *Astley*, and which said *E. Bowman* was afterwards, to wit, on, &c. at, &c., presented to the defendant, the bishop of *Chester*, to be examined, licensed, and admitted, who refused so to do. The second count
 stated

stated the same facts as the first count, and that the vicar refused to present *Bowman* to the bishop, and the bishop, after notice of such refusal, refused to examine or admit him, and on the contrary licenced and admitted defendant *Birkett* as minister of the said chapel. The third and fourth counts were respectively similar to the first and second, except that they omitted the intermediate nominations between *Barrett* and *Bowman*. Plea by the bishop, that the chapel was in the diocese of *Chester*, and that he had nothing in the said chapel except the licensing of ministers to the same chapel, and all such other things as belonged to the ordinary, as ordinary of that place. Plea by defendant, *Hodgkinson*, the vicar, first, that *A. Mort* did not declare and devise as alleged in the declaration. Second plea by *Hodgkinson*, that *T. Mort* did not die without having, by his last will and testament, or any deed in his lifetime, set down any course or order for the nomination and election of the minister of the chapel. Issue upon this traverse, and special verdict thereon. Third plea, that *T. Mort*, by deed-poll of the 3d August 1631, (not in defendant's possession, and which he therefore cannot produce) granted the chapel, and resigned and renounced his right to it to the bishop and his successors, with a traverse that *T. Mort* died without having by deed, in his lifetime, set down any order. There was an issue on the traverse, and special verdict found thereon. Fourth, that *Barrett*, clerk, was not duly nominated and elected minister of the chapel in manner and form, &c., upon which plea issue was joined. Fifth, that *James Marsh*, clerk, was not duly nominated and elected, &c., upon which issue was joined. Sixth, that *T. Mawdsley*, clerk, was not duly nominated and elected, &c., upon which

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which issue was joined. Seventh, that upon the death of *Mawdsly*, *John Barlow*, then being vicar of *Leigh*, did duly nominate and appoint *Robert Barker*, with a traverse that *Barlow* usurped. Issue upon this traverse, and a special verdict found thereon. Eighth, that *T. Mort*, by deed-poll of the 3d *August* 1631, gave and granted the chapel to the bishop, and resigned and renounced his right therein; and that defendant, *Hodgkinson*, being vicar of the parish of *Leigh* at the time of the vacancy by *Barker's* death, nominated and appointed defendant, *Birkett*, as minister. Demurrer and joinder. Ninth plea, the same as the eighth, with the omission of stating *T. Mort's* deed-poll. Demurrer and joinder. Pleas by the defendant, *Birkett*, the same as those by the vicar. Judgment against the Bishop, with a *cessat executio*.

At the trial before the Court of Common Pleas at *Lancaster*, the jury found that *Adam Mort* did devise, as in the declaration was alleged; that *Barrett*, *Marsh*, and *Mawdsly*, were duly nominated and elected ministers of the chapel as in the declaration alleged; that *Thomas Mort*, the son of *Adam Mort*, did after the death of his father make a deed-poll on the third of *August* 1631, which recited the building and endowing of the chapel by his father, and that he delivered it up to the bishop to be consecrated, and renounced (a) all title to the same. It was then found that the chapel was duly consecrated in 1631, and that it was taken down in 1760; and that a larger one was rebuilt on the site, and consecrated on the 11th of *June* 1760. The special verdict

(a) During the argument the Court intimated a clear opinion that the effect of the deed was to vest the chapel in the bishop for the purpose of consecration only; and that *Thomas Mort* did not thereby set down, any course or order of nomination, and that the right of nomination was not affected by it.

then

then set out the deed of consecration upon that occasion, which after various recitals stated that the bishop did consecrate, and did grant full power and authority to the ministers licensed to officiate in the chapel, to celebrate divine service therein, to read the public prayers, to expound the Holy Scriptures, preach the word of God, and to administer the holy sacrament, solemnize matrimony, church women, and do and perform all other divine offices which lawfully might be done in other chapels, according to the rites and usages of the church of *England*. It then stated, that the chapel yard was consecrated as a cemetery. But that all this was to be "without any prejudice to the mother church of *Leigh*, and the right and interest thereof, in all privileges, profits, tithes, oblations, obventions, fees, dues, wages, and ecclesiastical emoluments, whatsoever, to the vicar, and other minister of the same, for the time being, by law or custom in any wise of right belonging, and also the ordinary right of us and our successors, and the dignity, honor, and jurisdiction of our cathedral church at *Chester*, always saved and reserved."

The special verdict then stated that *T. Mort* did not, by his will, or any deed, except by the deed-poll, set down any course or order for the nomination of the minister of the chapel; that on the 23d of *February* 1769, the ministry became vacant by the death of *Marotely*; that one *J. Barlow*, the vicar, with *T. Froggott*, and 64 other land owners, nominated *R. Barker*, with certificate, thereof to the bishop, and that he was by the bishop examined, licensed, and admitted, but whether *T. Mort* died without setting down the order for the election, or whether *Barlow* the vicar usurped, the jurors were ignorant. The Court of Common Pleas at *Lancaster* gave judgment

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1825. judgment for the defendants, *Hodgkinson* and *Burkitt*, on their eighth and ninth pleas, but pronounced no judgment upon the special verdict. The record being removed by a writ of error into this Court, the case was now argued by

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Scarlett for the plaintiffs in error. There are two questions in this case. First, whether it sufficiently appears on the face of the declaration, that the right of nomination belonged to the plaintiffs; and, secondly, if it does, whether, upon the facts found in this special verdict, the right of nomination belonged to the householders and heads of families in the parish or to the vicar. As to the first, it is alleged in the declaration that *Bowman* was duly elected by the plaintiffs, being the greater number of the householders and head of families in *Astley*, to whom the nomination and election of the minister *then* belonged. The objection is, that it is not stated that the heir male of *Adam Mort*, and his nearest kindred holding lands in *Astley* concurred, or took any part in the election. But inasmuch as part of the allegation is, that the right of nomination *then* belonged to the plaintiffs, it must be presumed, after verdict, that the plaintiffs proved facts sufficient to shew the right to have belonged to them, at that time; which they might do by proving either, that the heir and kindred of *Adam Mort* concurred in the election, or were in the minority, or that there were no such persons. It is not necessary in quare impedit for the plaintiffs to shew a title to the advowson, they are only bound to make out a right to present. In a writ of right of advowson, it would be necessary to shew on the face of the pleadings, that the right to the advowson was actually vested in the plaintiffs; and, therefore, if this had been such
a pro-

a proceeding, it would have been necessary to allege the advowson to be in *the* plaintiffs, and the heir male of *A. Mort* and his next of kin. [*Bayley J.* If the allegation had been that the right belonged to *A. B. and C.*, and that *A.* had presented, to whom the nomination *at that time* belonged, would that have been sufficient, without shewing that *B. and C.* were dead ?] It would have been sufficient after verdict, although it would have been more satisfactory if it had been specifically alleged that *B. and C.* were dead. But there is no issue raised in this case on the fact that the right of nomination *then* belonged to the plaintiffs, and that being so, it must be presumed, after verdict, that such facts were proved as shewed that the right did belong to them.

The principal point in this case is, whether the right of nomination belongs to the parishioners, or to the vicar of *Leigh*. The origin of advowsons is thus given in *Co. Litt.* 119. b.: "Advowsons, so called because the right of presenting to the church was first gained by such as were founders, benefactors, or maintainers of the church, viz. *ratione foundationis*, as where the ancestor was founder of the church; or *ratione donationis*, where he endowed the church; or *ratione fundi*, as where he gave the soil whereupon the church was built." Now if that be the principle upon which the right to advowsons is founded, the same principle must apply to parochial chapels and chapels of ease (*a*), provided the rights of the mother church are not interfered with. If the founder of such a chapel were to insist that a portion of the tithes, or the fees, should be given to the chaplain, the rights of the rector or vicar would be invaded, and that could only be done with his consent; and to make that binding on his suc-

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(a) See 1 Burn Eccl. Law. tit. Chapel.

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cessors, there must be a compensation to the rector or vicar. Now it appears, from the record, that the parish of *Leigh* being extensive, *A. Mort* built and endowed the chapel from pious motives, and that he did not seek to invade the rights of the vicar, and that all his emoluments were reserved to him by the deed of consecration. Inasmuch, therefore, as the rights of the vicar are not invaded, the right of presentation, according to the authority of Lord *Coke*, must belong to the person who founded and endowed the chapel, or to his appointees. If any of the temporal rights of the vicar had been invaded, it would then have been necessary to have shewn not only that he had consented to the right of nomination remaining in the founder, but that he had received an adequate compensation. [*Bayley J.* Would not such a right interfere with the spiritual obligations of the vicar? He has the cure of souls in the parish, and is it not his duty to take care that any person preaching in the parish should preach proper doctrine?] The bishop will take care not to license any person likely to preach doctrines contrary to those of the established church. It appears from the record that it was not in the power of the vicar to extend his spiritual labours over the whole parish; and the question is, whether he might not purchase assistance by consenting to an endowment, and giving to the person endowing the right of nomination of the minister. There are three cases only which bear upon this subject; the first is that of *The Attorney General v. Brereton (a)*, and the question there was, whether the right of nomination of the curate to a chapel was in the vicar of the parish or the bishop, and it was held to be in the vicar. But there was no claim in that case by any person who had

(a) 2 *Ves. sen.* 424.

founded

founded and endowed the chapel, and, therefore, it is not an authority in point. The next case is *Herbert v. The Dean and Chapter of Westminster*. (a) In the plague which happened in 1625, the church-yard of *Saint Margaret's, Westminster*, not being large enough to bury the dead parishioners, the inhabitants of that part of the parish which then resorted to the new chapel built there, petitioned the dean and chapter of *Westminster* (who were lords of the manor) to grant them a waste piece of ground to bury their dead, which, accordingly, the dean and chapter did, under their seals, and it was solemnly consecrated. Afterwards these inhabitants were at the charge of building a chapel there, having first obtained a royal licence for that purpose. The vestry-men and chapel-wardens had, ever since the year 1653, elected the ministers who were to preach there; but the dean and chapter of *Westminster* claimed a right to name the minister who should preach and do divine service in this chapel. It does not appear that the persons who originally contributed to the expence of building the chapel, and the dean and chapter who granted the soil upon which the chapel was built, concurred in making any appointment, and they were the persons to whom the right of presentation would belong, according to the doctrine of Lord *Coke*. The Lord-Chancellor, in his judgment, expressly observes, that the dean and chapter had not reserved any power to nominate the preacher, and that the inhabitants of the chapelry were the persons who endowed it. He then recognizes the doctrine laid down by Lord *Coke*, that the building and endowing of the church was what, at common law, entitled the patron to the patron-

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(a) 1 Peers, Wms. 775.

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age. And he afterwards says, "Suppose I build a chapel in my house for myself, the parson is not bound to provide for it; or I build a chapel in my house for myself or my next neighbour, can the parson name one to preach there? I think not, and it will make no alteration if the chapel which I build in my own ground be intended for the use of twenty neighbours, besides my own family." All the reasoning of the Lord Chancellor is in favour of the right claimed by the present plaintiffs. It is true that the Court afterwards determined that the right of nomination did belong to the dean and chapter, although no reasons were given for the judgment. But in that case the dean and chapter of *Westminster* were the real patrons of the chapel, for they gave the land upon which it was built: but they being a body who could not alienate as a private person might, the right to the land and the building on it still continued in them. The next case is *Dixon v. Kershaw* (a), and it will be relied upon by the other side. It appeared in that case that the lord and freeholders of the manor had granted a part of the waste to secure an annuity of 27*l.* for the use of a minister to officiate in the chapel of *Almley*; and by another deed the lord and lady of the manor, and other freeholders, granted to trustees the land whereon the chapel was built. It was afterwards consecrated, and in the instrument of consecration the archbishop took upon himself to grant the nomination of a minister to officiate there to the inhabitants of *Almley* and *Wortley*; and the vicar of *Leeds* was present at the consecration, and declared that he had no right to nominate a curate to the chapel. The inhabitants of *Almley* and *Wortley* had, from the time of

(a) *Ambler*, 528. 2 *Eden's Rep.* 360. *S. C.* by name of *Dixon v. Metcalfe*.

consecration,

consecration in 1754 to 1761, elected the minister to officiate there. The chapel then becoming vacant, the inhabitants elected the plaintiff, and the vicar nominated *Metcalf*; and in that case Lord *Northington* held the right of nomination to be in the vicar. But there the donors of the land did not either claim for themselves, nor had they given to any other person, the right of patronage; and that being so, it must, as a matter of course, have belonged to the rector or vicar of the parish. It is quite clear, that the inhabitants not being the nominees of the founder or endower of the chapel, had no right to present, and they could derive no such right under the deed of consecration, because the archbishop had no power to give such right. But in this case the chapel was built with the consent of the ordinary and incumbent. It was founded and endowed by a private individual, and there being no invasion of the temporal rights of the vicar, the founder, or his appointees, are the patrons of the chapel.

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Tindal contra was stopped by the Court.

ABBOTT C. J. I am very clearly of opinion, that the want of an allegation in this declaration, that this nomination was made at a meeting, at which the heir and kindred of *Adam Mort* were present, (no reason being assigned for their absence,) is of itself a sufficient objection to the plaintiff's right to recover, and that upon that ground alone, if there were no other, the judgment of the Court below ought to be affirmed. But as the affirming of the judgment upon that ground alone might still leave open a door to future litigation and expence, and as it is very desirable that such a result should be avoided in a case of this sort, wherein dispute and litigation are most

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injurious in their consequences, by creating dissensions between the clergyman and his parishioners, I thought it best to hear the argument in support of the right of any person claiming under *Adam Mort* or *Thomas Mort*, to officiate in this chapel without the consent of the clergyman. I have always understood it to be a general rule of law, that no person can be authorized to preach publicly within a chapel to which all the inhabitants of the district may have a right to resort, without the consent of the clergyman to whom the cure of souls is given. I do not speak of a chapel belonging to a private individual, where service is performed for the convenience of his family and friends, but of a chapel open to all the inhabitants of a certain district. Where there has been an endowment of a chapel beyond the time of legal memory, and the nomination has gone in a particular course, we must presume that course to have been according to the will and pleasure of the founder, and we must presume in a case of prescription every thing necessary to give effect to that which has for so long a period been done. In such a case, therefore, we must presume a consent, not only of the rector or vicar, which can be obligatory upon them, but of the patron and the ordinary. In *Dixon v. Kershaw*, Lord *Northington* says, that a mere arbitrary agreement, made even with the consent of the parson, patron, and ordinary, without a compensation to the incumbent of the mother church, will not be sufficient. Perhaps that expression requires some qualification, and where nothing is taken from the income of the incumbent, the consent of the parson, patron, and ordinary, without a compensation, may be sufficient. But still the doctrine, which appears to have been the foundation of the decision, is distinctly this: that it is undoubtedly

doubtedly law, that wherever a chapel of ease is erected, the incumbent of the mother church is entitled to nominate the minister, unless there is a special agreement to the contrary, to which parson, patron, and ordinary must be parties. There being in this case no special agreement to which parson, patron, and ordinary, were parties, it appears to me that no person can have a right to compel the vicar of the parish to allow another, although licensed by the bishop, to officiate in a public chapel, erected for the ease of the inhabitants of a portion of the parish; and that no such person can officiate without the consent of the vicar. We are not called upon in this case to decide, that the vicar has a right to nominate. It is sufficient for our judgment to say, that these persons cannot have the right without the consent of the vicar, and his consent, it appears by this record, they certainly had not. It is unnecessary to advert to the other cases, with reference to which I would only remark, that the case in *Peere Williams*, though appearing, perhaps, to be contrary, if the facts could be ascertained, would not probably be found to be so, for I think Dr. Broderick was the vicar at the time, and he assented to the claim of the dean and chapter. But without relying upon that distinction, *Dixon v. Kershaw* being the last case, and the law being there laid down distinctly by the Lord Chancellor, in a manner consistent with what I have understood to be the right of the vicar, that you shall not enable any person to preach in his parish without his consent, unless under special circumstances, which do not exist in the present case, I am of opinion that the plaintiffs have not shewn a right to present, and that the judgment given in the Court below must be affirmed.

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BAYLEY J. My opinion in this case is founded on the principle, that the endowment of this chapel in the manner in which it was endowed, and the mere consecration by the bishop, without the concurrence of the then incumbent and the patron of the living of the parish, did not give to the inhabitants and the other persons named by the founder, such an interest in this chapel, as entitled them to present a person to hold the chapel for his own life, and to bring a quare impedit in respect of it. I am not aware that there has been any instance where a quare impedit has been brought on a presentation to a chapel of this description. I know it has been done in the case of a chapel erected by the King's licence. But my opinion is founded upon this general position, that you have no right without the concurrence of the patron and incumbent, to interfere either with the temporal rights or spiritual obligations of the vicar. It has been conceded, that if you were to interfere with the temporal rights of the vicar, the claim of a right of nomination as resulting from the endowment could not be supported; but it was argued, that its interference with the spiritual obligations of the vicar did not stand upon the same footing. It appears to me, that if the vicar has the cure of souls co-extensive with the whole limits of his parish, that casts a very serious and important duty upon him, and he has a right and is bound as the conservator parochiæ to take care that no person shall deliver doctrine in that parish, except under his sanction and authority.

It is said, that the bishop will never appoint an unfit person, but if the vicar has the cure of souls in the parish, he has a right to act on his own judgment, and is not bound to trust to the judgment of the ordinary. Whether the vicar is bound to put in a person who is to hold

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it for life, may be another very important and material question. Although the chapel is endowed, the vicar may be entitled to put in a person, not for the period of his life, for age and infirmities might render him unable to discharge the duties of such a station. The vicar may be at liberty to put a person into possession of that place to remain there so long only as his doctrine and his conduct should be agreeable to the judgment of the vicar, and so long as the vicar should find he was competent to discharge the duties of the office. Allowing the quare impedit to be brought in the names of those persons to whom the founder has given the right of nomination or presentation, (if the founder could give any such right,) entirely supersedes all judgment of the vicar in that respect, and ties down him and his successors during the whole period of the life of the person who may have been originally nominated. It seems to me, that looking to the spiritual obligations of the vicar in his parish, no person can have a right to force upon him in a chapel in that place, any particular individual; I think by law, that cannot be done. If we had been fettered by authorities to the contrary, we must of course have acted on those authorities. In the case of *Herbert v. The Dean and Chapter of Westminster*, the question was, in whom the right of nomination was to be, but whether that nomination was to be for the whole life of the nominee does not appear. The result of a decision in this case in favor of the plaintiffs would be this, that wherever a person now should think fit to build a chapel upon his own land, and make and endow it as a chapel of ease, and prevail upon the bishop to consecrate it, that would afterwards be binding upon the vicar or the rector of the parish in which that chapel was erected, and secure to the founder, and the heir of the founder, if

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he reserved it to himself by the deed of endowment, the right to put in such person as he might from time to time think fit. I am of opinion, that the general rights of the vicar are inconsistent with such a notion. The case of *Dixon v. Kershaw* is distinguishable from this, because there the person who claimed the appointment founded the claim, not on the gift of the founder, but on the gift of the archbishop. But Lord *Northington* did not decide that case merely on the want of title in the inhabitants; he puts it upon three grounds; first, on the want of legal title in the clergyman, presented by the inhabitants; secondly, on the want of equity; thirdly, on the usurpation on the rights of the vicar. I think the effect of this *quare impedit* would be to intrench upon the rights of the vicar in a way in which they ought not to be affected. Upon that ground, I am of opinion, that the judgment should be affirmed. We have no occasion to decide in this case, whether the vicar has the right to present, or whether he is bound to nominate for life, because there is no prayer of a writ to the bishop in the defendant's plea; and it becomes no part of the judgment, that a writ to the bishop to admit the defendant's clerk should issue.

HOLROYD J. Without considering, whether in this case a writ of *quare impedit* is the proper remedy (a), I think the present action cannot be supported for the reasons already stated by my Lord Chief Justice, and my brother *Bayley*. It is perfectly clear with respect to the first point, that the mere allegation, that the right

(a) See *Rex v. Marquis of Stafford*, 3 Term Rep. 646. and *Rex v. Bishop of Chester*, cited in argument in 1 Term Rep. 398. But the plaintiffs must shew a seisin in themselves, or those under whom they claim, *Comyn. Dig. Pleader*, 3. I, 4. Quære, if householders not being a body corporate are capable of having such a seisin, for they cannot take by succession. See *Russell v. The Men of Devon*. 2 Term. Rep. 667.

belonged

belonged to the plaintiffs at the time when they made this nomination is not sufficient. The parties must shew the facts, and particular circumstances out of which the right which they allege to exist in the persons making the nomination arises; they must state the facts from which it shall appear, whether they have or have not that right. It is clear from the statement in the declaration, (if taken by itself, and without the aid of some further facts), that the right did not exist in the persons making the nomination; it at least appears to have been in others as well as themselves, unless some circumstances existed, which are not stated, to shew that the right was duly exercised by the persons who made the nomination. That of itself is a complete answer to the present action. But I think further, that the right of nomination to this, as a public chapel, was not in the persons making the nomination, even supposing that the heirs male of *Adam Mort* were to be considered as bearing a part in that nomination, so as to obviate the formal objection. This is very different from the case of a nobleman's chapel, or the chapel of a person building it on his own property, and in respect of which public rights have not been superinduced. The consecration of this for the use of a particular township of this parish gives the inhabitants of the township a right to resort to it as a chapel, and when a minister is appointed, it gives him a right of continuing, which is very different from the case of a private chapel, where a person is appointed by the owner of the chapel to perform divine service. By that appointment he would gain no freehold interest, and might be displaced whenever the party who appointed him should think fit. In such a case, the appointment would give the minister permission to enter, but would not give him a right to continue to do so. This is very different, being

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being the case of a chapel consecrated for the use of a parish, or a portion of a parish; and upon the authority of the decided cases, I think that we must hold that, independently of the formal objection, the present *quare impedit* cannot be maintained, even supposing that one would lie for a chapel of this description.

LITLEDALE J., having been counsel in the case while at the bar, gave no opinion.

Judgment affirmed. (a)

(a) The ordinary form of the judgment in *quare impedit* is, that the plaintiff recover his presentation. *Mallory's*. *Quare impedit*, p. 86, 87, &c. This would not apply to the second and fourth counts in this case.

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A. paid a nominal rent to the king for 1000 acres of woodland, the wood being all reserved to the crown. During four months in the year, A. exercised the privilege of shooting over the land, and by

TRESPASS for breaking and entering the plaintiff's close called *The Banks*, and a certain other close called Allotment No. 15., situate in the parish of *Hanbury*, in the county of *Stafford*, and with feet in walking treading down the grass and herbage of the plaintiff, and breaking down part of the hedges and fences of the said closes of the plaintiff, there standing and being.

his permission another person took the grass: Held, that the payment of the rent, the exercise of the privilege of shooting, and the taking of the grass was sufficient evidence to shew that A. was in the actual possession of the land, so as to entitle him to maintain trespass.

A. occupied under a parol licence from the crown, and the rent paid by him was much less than one third of the annual value of the land: Held, that as A. had no legal conveyance from the crown by matter of record, and as the rent reserved was not one third of the annual value of the land, as required by the 1st *Ann*, st. 1. c. 7. s. 5.: he had no legal right to retain possession of the land as *against the crown*, but that as he occupied with the permission of the crown, his possession was sufficient to enable him to maintain trespass against a wrong-doer.

Semble, that a person who occupies crown land under a parol licence is not an intruder.

A public footway over crown land was extinguished by an inclosure act, but for 20 years after the inclosure took place the public continued to use the way: Held, by *Bayley J.*, that this user was not evidence of a dedication to the public, as it did not appear to have been with the knowledge of the crown.

Plea

Plea first, not guilty; second, a public right of footway. At the trial before *Garrow B.*, at the last spring assizes for the county of *Stafford*, the following appeared to be the facts of the case: The close where the trespass was committed was part of an allotment made to His Majesty, by the award of the commissioners under an act of parliament passed in 1801, for dividing, allotting, and enclosing the forest or chase of *Needwood*, in the county of *Stafford*. The act recited that the King was seised to himself, his heirs, and successors, of the forest or chase of *Needwood*, containing about 9400 acres, lying within the honor or lordship of *Tutbury*, parcel of the estates and possessions of the duchy of *Lancaster*, in the county of *Stafford*, subject to common of pasturage, and other rights therein mentioned; and the commissioners were thereby empowered to set out such public bridle-roads and footways, and private roads and ways, in, over, and upon the said forest or chase, as they should think requisite. It then enacted, that after the several public or private roads should have been set out and made, it should not be lawful for any person, either on foot or with horses, cattle, or carriages, to use any other roads or ways, either public or private, over or upon the ancient or new inclosures, or the forest or chase, than such as should have been made and set out by the commissioners; which said several roads so to be set out respectively should be set forth in the award of the commissioners, and the same should be final and conclusive upon all persons whomsoever; and that all former roads and ways which should not be set out and appointed as roads and ways through or over the said forest or chase, should be deemed part thereof, and be divided and allotted accordingly. By another clause,

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His

1825. His Majesty, his heirs, and successors were enabled to make and grant leases, under the seal of the duchy of Lancaster, for any term or number of years, not exceeding 99 years, and so as such leases be in all other respects made and granted agreeable and conformable to the terms and conditions prescribed and directed by the statute 1 Ann. statute 1. c. 7. It was proved that the plaintiff had, ever since the year 1817, paid to His Majesty, for the woodlands of his allotment of *Needwood*, (the timber being reserved to the King,) a nominal rent of 1*l.* per annum, which was not one third of the annual value. These woodlands comprised about 1000 acres, and included the close where the trespass was committed. It appeared that the game-keeper, the deputy axe-bearer, and the woodward, who had the care of the woods and timber, were paid by the crown, and the fences were repaired at the expence of the crown. The plaintiff, who resided principally in *London*, usually came to *Needwood* about *August*, and remained there until *November*, and during that interval, he and his friends went over the whole of the allotment, including the close in question, for the purpose of shooting game. One *Wallace*, the woodward, took the grass in the glades by the plaintiff's permission. The award of the commissioners was executed in 1805, and no footpath across the close in question was set out in that award. Before the enclosure act there were paths in all directions, and, among others, one over the close where the trespass was committed. In 1806 the whole aliotment was fenced all round, and no road or path was left over the close in question, and about fifteen years ago, a notice was affixed at the end of the path, stating that there was no road, and that all persons trespassing would be

be prosecuted according to law. The trespass was admitted. It was objected by the defendant that the plaintiff had not proved that he had any lawful possession of the land where the trespass was committed, because he had not any grant under the seal of the duchy of *Lancaster*, or, assuming that there might be a parol demise of land by the crown, yet the stat. 1 *Ann.* stat. 1. c. 7. s. 5. had not been complied with, because the rent reserved was not one third of the annual value of the land. The learned Judge was of opinion, that the plaintiff had sufficient possession to maintain trespass against a wrong-doer, but he reserved leave to the defendant's counsel to move to enter a nonsuit. Evidence was offered on the part of the defendant to shew that a footway over the close in question was actually set out by the surveyor, who made the allotments under the enclosure act. The learned Judge was of opinion, that the award of the commissioners was conclusive upon that point, and refused to receive the evidence. The defendant then gave evidence to shew that ever since the time of making the award the footway had been generally used by the public, and it was contended that this proved a dedication of the way to the public. The learned Judge told the jury to find for the defendant, if they were of opinion that the user of the way, since the making of the award, had been with the assent of His Majesty, who was the owner of the soil, otherwise for the plaintiff. The jury having found for the plaintiff, a rule nisi for a nonsuit or a new trial was obtained, in last *Easter* term, upon two grounds; first, that the plaintiff had not a rightful possession of the land where the trespass was committed, but was a mere intruder on the possession of the crown, and, therefore, could not maintain trespass; and, secondly,

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 Charlesworth.

condly, that there was sufficient evidence to shew a dedication of the way to the public, and, therefore, that the jury ought to have found for the defendant.

Jervis, Walton, and Campbell now shewed cause. There was a parol licence from the crown to the plaintiff to occupy the woodland in the forest, and a payment of rent by the plaintiff from 1817. Between subjects such a licence would operate as a parol demise of the land, and would create a tenancy from year to year, or a tenancy at will, but the objection in this case is, that inasmuch as the land belonged to the crown, the plaintiff could derive no title by parol demise, and that he was, therefore, an intruder, and as such could not maintain trespass. It is true, that the plaintiff had no title as against the crown, but he had a sufficient possession of the land with the consent of the crown to entitle him to maintain trespass against a wrong-doer. The law laid down by *Anderson C. J.* in 4th *Leonard* 184, and *Godbolt* 133, is relied upon as an authority to shew that an intruder on the crown cannot maintain trespass, but that is at variance with a subsequent case of *Johnson v. Barrett*. (a) That was trespass for carrying away the soil and timber. The question arose upon a quay which was erected at *Yarmouth*, and destroyed by the bailiffs and burgesses of the town. There was a difference of opinion, whether supposing it to be between high and low-water mark, it belonged to the crown or to the person who had the adjoining land, but it was agreed by the Court, that an intruder on the King's possession might have an action of trespass against a stranger, but that he could not make a lease whereupon the lessee might

(a) *Allyn*, 10, 11.

maintain

maintain an ejectment. Lord C. B. *Comyn*, in his Digest, tit. Trespass. B. 2. recognizes the authority of this case, and lays it down, that an intruder on the King's possession may maintain trespass. In the case reported in *Leonard and Godbolt, Rhodes J.* cited in support of the position there laid down, 19 *Ed. 4.* 2 pl. 5., which appears from *Plowden* 489, to have been an action of trespass for entering into a close, and taking the grass; the defendant pleaded that it was found by office, that the tenements escheated to the King *before the day of the trespass*, and it was held, "that as to such things as arise from the land, as the grass and the like, the action, which was well given to the plaintiff, was taken away by the office found afterwards, which, by its relation, entitled the King thereto; but as to the entry into the land, or breaking of fences, which do not arise from the land, nor are any part of the annual increase of it, the action is not taken away by the office." That case, therefore, shews, that a person in possession of land belonging to the King may maintain an action for an injury to his possession done after his right to the land has ceased by the escheat; although he cannot recover the profits of the land, because those belong to the King. It does not, therefore, warrant the position for which it was cited by *Rhodes J.*, that an intruder on the King cannot in any case maintain trespass against a wrong-doer. As to the other point, the user of the footway since the award, was no evidence of a dedication of the way to the public, because there could not be any dedication without the assent of the crown. The land was in the possession of the King's tenant, and in such a case there could not be a dedication, *Wood v. Veal*. (a)

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(a) 5 B. & A. 454.

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W. E. Tainton, Brougham, and Russell, contra. There was no evidence to shew that the plaintiff had any actual possession of the land. It appeared only that he had a liberty of shooting over the land for a few months in the year. The effect of Wallace's evidence was to shew the possession to be in him, for he took the grass which was part of the profits of the land belonging to the crown. But assuming that the plaintiff had an actual possession, it is necessary, in order to maintain trespass, that he should have a lawful possession. In *Dyson v. Collick (a)*, the plaintiff had lawful possession of the bank at the time when the trespass was committed. In *Graham v. Peat (b)*, the lease was originally valid, and was defeated by matter subsequent, viz. by the non-residence of the rector, but in this case the supposed demise by the crown never existed in point of law. In *Viner's Abr. tit. Prerog. M. b. 7.* it is laid down, that nothing shall pass from the King but by matter of record, and Br. Prerog. pl. 70. is cited; and the following instances are given in the margin: "The King may give several things without writing, and yet if it comes in ure in the law, it is good for nothing. Per Brian clearly, Br. Prerog. pl. 61. citing 4 *H. 7.* But *Shelly J.* was precise in the time of *H. 8.*, that it is a good gift of chattels moveable without writing, as of a horse, &c. *ibid.* S. P. Br. Prerog. pl. 70., citing 35 *H. 8.*" These authorities shew that no interest in land can pass from the King, except by matter of record. The same rule applies to lands in the county Palatine of *Lancaster*, they only pass under the seal of the duchy. (c) And *Co. Litt. 7.*, and Sir *Moile Finch's* case (d), are authorities

(a) 5 *B. & A.* 600.

(b) 1 *East*, 244.

(c) 4 *Inst.* 210. *Dyer*, 232.

Lutwyck, 1233.

(d) 2 *Leam.* 134.

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to shew that there can be no tenant by sufferance of the crown, but that he who holdeth over is an intruder, because no laches can be imputed to the king for not entering; and *Co. Litt.* 41. b. is an authority to shew, that as against the king there shall be no occupant, because *nullum tempus occurrit regi*, and therefore no man shall gain the king's land by priority of entry. The *Needwood* forest act enables His Majesty to grant leases, provided they be consistent with the 1 *Ann.* st. 1. c. 7. s. 5. Now, that section requires that upon every grant of a lease of lands, there shall be reserved a reasonable rent, not being under the *third part* of the clear yearly value of such lands, &c., and that such rents be made payable to His Majesty." In this case, there was a mere nominal rent reserved; and, therefore, the demise (if there was any) must be void within the provisions of that statute. Then, if that be so, the plaintiff was a mere intruder upon the possession of the crown, and in the case in 4 *Leon.* 184., and *Godbolt* 133., it was decided, that such an intruder cannot maintain trespass. It is true, that *Johnson v. Barrett* (a), is at variance with that case, but it does not distinctly appear that the right of soil belonged to the king, for it is not stated that the quay was erected between the high and low-water mark. Then, the case cited from the year book, 19 *Ed.* 4. is perfectly consistent with the decision in *Leonard* and *Godbolt*, because the action was brought for a trespass committed before office found, although after the lands had vested in the king by relation from the death of the tenant; and the king could not have possession until office found. In

(a) *Aleyn*, 10, 11.

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Bacon's Abr. tit. Prerog. E. 7., it is laid down that in all cases where a subject shall not have possession in deed or in law without entry, the king will not be entitled without office found or other matter of record : as if the king's tenant alien in mortmain, or without licence, or if the king claims upon a forfeiture or a condition broken, his title must be found by office. Or, if he claims the lands of an idiot or lunatic, &c., the person ought to be found an idiot or lunatic, &c., by office. Now, if, in the case in the year book, the reversioner had been a subject, he could not have had possession without entry, and if so the king to whom the land had escheated could not have possession without office. In Sir *Moyle Finch's* case (a), it was decided, although the lease there was void for the breach of the condition by non-payment of the rent, that the possession of the land was not resettled in the queen without office ; and although the office did not make the lease void, which was void before for the non-payment of the rent, yet before office found the possession was not vested in the queen, for before office found the Court could not award process against such a lessee for his continuing the possession after the rent behind, and until office found *the lessee could not be found an intruder*. This is an authority to shew, that, although the king be entitled to land by escheat or otherwise, the possession of such land does not vest in the king until office found, and that, until office found, the right of possession remains in the party who held under the king's tenant ; and, consequently, that he might maintain an action for an injury to such possession, and this explains the case in *Aleyn*. For assuming that the land where

(a) 2 Leon. 143.

the quay was erected belonged to the king (which does not distinctly appear) he could not have possession till office found. Co. Litt. 162. shews, if a lessee at will dies and his heir enters, the lessor may before entering have trespass against him or a stranger; and in *Gray v. Bearcroft* (a), *Bridgman* C. J. was of opinion that a lease at will being determined by the death of the lessee, the lessor might without entry maintain trespass. Assuming, therefore, that the present plaintiff was a lessee at will, the right to bring trespass in this case was in the crown and not in the plaintiff. [*Holroyd* J. Although the crown might have maintained trespass, it does not follow that the present plaintiff may not also. There are authorities to shew, that where land is let to a lessee at will, and a trespass is done upon the land, both the lessor and lessee may maintain trespass. (b)] But, assuming that the plaintiff had a rightful possession, there was sufficient evidence for the jury to presume a dedication of this way to the public, for it appeared that since the making of the award, the public had always used the way over the close.

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BAYLEY J. The first question in this case is, whether the plaintiff had any actual possession of the land where the trespass was committed? That does not appear to have been a matter of dispute at the trial, and certainly was not the ground upon which the motion for a new trial was obtained. It appears to me that there was strong evidence to shew that there was actual possession in the plaintiff. The property belonged and the timber was reserved to the king; but every description

(a) *Carter*, 66.

(b) *See Jarvis's Case* 1 *Ryan. & M. Crown cases* 1824. P. 7. 2 *Bell* Ab. 551. L. 46. Com. Dig. Tres. B. 2.

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of enjoyment was not exercised by the king, or by any person claiming under him. The plaintiff paid a nominal rent of twenty shillings a year, and that rent must have been paid for something; and it must have been accepted upon the principle that, even if there was not a proper species of conveyance so as to give the plaintiff a right as against the crown, he was entitled to have something. Now what was the land capable of yielding? It was woodland, with rides on it, and there was a considerable quantity of game on it; and, therefore, it afforded to any person going there an opportunity of killing game. The plaintiff himself did not appear to have any other enjoyment of the land than that of shooting the game; he usually came about *August* and remained till *November*. *Wallace* had the grass, and he took it by licence, not from the crown, but from the plaintiff, and that licence did not vest the possession in *Wallace*, but a privilege only which the plaintiff had conferred upon him. When, therefore, *Wallace* took the grass, he took it as the representative of the plaintiff, and that was a pervenance of the profits by the plaintiff. If the learned Judge had been desired to put the question to the jury, whether there was or was not an actual possession in the plaintiff, he could not with propriety have directed them to come to the conclusion that there was not an actual possession.

It is insisted, however, in this case, that although the plaintiff may have had the actual possession, yet the land being crown land, and there not being any grant by matter of record, and the rent paid being less than one third of the annual value, as required by the statute 1 *Anne*, stat. 1. c. 7. s. 5., the possession was not such as to enable him to maintain trespass against a wrong

wrong doer. I think that as there was no such grant, as the stat. 1 *Anne*, c. 7. s. 5. and the *Needwood Forest* act require, the plaintiff had no legal title against the crown, and the crown might at any time, without notice, have removed him from that possession and occupation. Then it becomes a question, whether a person having the actual possession of crown land can maintain trespass against a mere wrong doer? Generally speaking, actual possession is sufficient to entitle a party to maintain trespass against a wrong doer. That is established by a great variety of cases. *Chambers v. Donaldson and others*(a) is a very strong authority upon this point. That was trespass for breaking and entering the plaintiff's dwelling-house, the defendants pleaded, that the dwelling-house was the soil and freehold of *A. B.*, and that they, as *his servants, and by his command*, broke and entered the same. The plaintiff, in his replication, said that they did not do it *by the command of A. B.*, and there was a demurrer to that replication, on the ground that the plaintiff having, by his replication, admitted the soil and freehold to be in another, had thereby admitted that he had no cause of action, and that the fact whether the defendant entered by the command of the other or not, was immaterial and not traversable. The Court decided that although upon the pleadings it must be taken, that the plaintiff had a wrongful possession, as against the person in whom the freehold was, yet that such a possession was rightful, and sufficient to enable the plaintiff to maintain trespass, against a wrong doer, and that unless the defendants acted under the authority of the person in whom

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(a) 11 *East*, 65.

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the soil and freehold was alleged to be, they could not justify committing a trespass against any person in the actual possession of the land. But a distinction has been taken between land belonging to a common person, and land belonging to the crown; and if that distinction be valid in point of law, the defendant must have the benefit of it in this action. That distinction is founded on the authority of a case very loosely reported, in 4 *Leonard*, 184., and *Godbolt*, 133. *Anderson C. J.* says, "If one intrude upon the possession of the king, and another man entereth upon him, he shall not have any action of trespass for that entry; for that he who is to have and maintain trespass, ought to have a possession. But in such case he hath *not a possession*, for every intruder shall answer to the king for his whole time, and every intrusion supposeth the possession to be in the king." Now the words "another man entereth upon him," I apprehend to mean, that another intruded, and ousted the person originally in possession. In that case the right of possession would remain in the crown. Suppose, for instance, *A.* being an intruder enters, and *B.* afterwards intrudes, and excludes *A.* *A.* brings trespass against *B.* *A.* cannot maintain this action, because during the whole of the time the possession was not legally and properly in *A.* or *B.*, but the right of possession, during the whole time, was in the crown. The crown would have a right to call upon *A.* for the profits for that time during which he had been in possession, and on *B.* for the same, during the time he had been in possession; and, therefore, *A.* cannot call upon *B.* for any part of those profits. The report goes on to say that *Periam* doubted, and *Rhodes J.* said

said and vouched, 19 *E. 4.* 2 Pl. 5., to be, that he cannot in such case say, in an action of trespass, *quare clausum suum fregit*. The case from 19 *E. 4.* referred to by *Rhodes J.*, when examined, explains the meaning of the language in *Leonard and Godbolt*, "That every intruder shall answer to the king for his whole time." It was trespass for breaking and entering the plaintiff's close, taking his grass, and cutting his trees. It was, therefore, an action brought against the defendant *for taking the profits of the land*. The defendant pleaded, that before the day of the trespass a commission issued from the exchequer, directed to the escheator of the county of *Suffolk*, to enquire of all manner of lands and tenements, &c.; and before the escheator in the same county it was found that one *John B.* held the same land of the king, &c., and died without heir, wherefore the king *entered*, &c. Judgment, &c. *Vavisor (a)*. "This is no plea, for notwithstanding that the king has cause to have all manner of issues and profits issuing out of, &c., yet this shall not excuse him who did the trespass; as, in like case, if a stranger take certain goods (which I have) out of my possession, and he whose property they are release to the stranger, still I shall have an action of trespass against him for the taking, &c., and yet he shall have the goods." *Townsend*. "The contrary appears to me, for I apprehend when the king is entitled to have any land, he shall be answered for the issues and profits from the first day of his title to the day of office found, and that every man shall answer for his time, namely, each of those who occupied for the time of his occupation,

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(a) *Vavisor* and *Townsend* were made Sergeants in 18 *Edw. 4.*

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Then, if he who shall have the administration and occupation of such lands shall have no action, in this case it shall be that he account for the issues (arising during his occupation), and yet the defendant have them, which would be unreasonable." *Choke*. (a) "For such things as arise from the land, the action by this office found is clearly gone; but for such things as do not arise from the land, as for entering the land and breaking the hedges, or for the taking of any chattel, in this case the action is not gone by the office and seizure for the king; but where the action is brought for things which arise from the land, as for cutting grass and the like, there, when the office is found for the king, all actions are gone for ever, for he shall not answer for those matters; but this person shall answer for the time; wherefore, &c." The decision then in that case was, that trespass was not maintainable by one intruder against the other to recover the profits of the land, because each of them was liable to account to the crown for all profits arising during the period of his occupation, but that the action was maintainable by the first intruder against the second to recover a compensation for an injury to the possession, not in any way affecting the profits of the land. That case, therefore, does not warrant the position for which it was stated by *Rhodes J.* It had been found by office that the lands belonged to the king, and all the profits belonged to the king from the death of his tenant. The plaintiff, therefore, not only had a wrongful possession, but the king, by *entering*, shewed that he meant to treat the possession as wrongful. The

(a) 'It appears that *Choke* was at this time a Judge of *C. B.*, *Brim* being Chief Justice. See *Bro. Abr. Trespass*, pl. 347. 358, 359.

plaintiff

plaintiff could have no right to recover the profits of the land, but the king would be entitled to them. But still it was held that, notwithstanding he had a wrongful possession as against the king, he might maintain trespass against a wrong doer. There is a subsequent case of *Johnson v. Barrett* (a), which is at variance with the doctrine laid down in *Leonard and Godbolt*. It was an action of trespass for carrying away soil and timber. The question arose upon a quay that was erected at *Yarmouth*, and destroyed by the bailiffs and burgesses of the town. There was a difference of opinion on the bench, whether, if it were erected between the high-water mark and low-water mark, it belonged to him who had the adjoining land, or to the king? But it was agreed that an intruder upon the king's possession might have an action of trespass against a stranger, but that he could not make a lease whereupon the lessee might maintain an *ejectione firmæ*. Now that is an authority to shew that an intruder may have a possession sufficient to enable him to maintain an action against a person who does an injury to that possession, but that he cannot maintain any action in which it would be necessary to prove title. Apply that doctrine to this case: the plaintiff had no title to enable him to maintain an ejectment, because he had not a legal conveyance from the crown; but still, according to the authority in *Aleyn*, he would be entitled, by reason of his actual possession, to maintain trespass against a wrong doer. These are certainly conflicting authorities; but the case in *Aleyn* is later in point of time than that in *Leonard*; and I think that the rule laid down in *Aleyn* is more reasonable,

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(a) *Aleyn*, 10, 11.

because

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because it is better calculated to prevent wrongful trespasses than that of the former case. It is useful that the party whom the king allows to have the actual possession should be at liberty to call to account individuals who commit trespasses on the land, rather than that the crown should be driven to its prerogative process, to punish minute trespasses.

But assuming that the doctrine in *4 Leonard* 184., is correct in point of law as applied to intruders, then the question arises, whether the plaintiff comes within the character of an intruder. It seems to me that he does not. I consider an intruder to be not merely a person who comes in without any legal sanction from the crown, but one who comes in, if not against the will, at least without the knowledge of the crown. Here the plaintiff was in the actual possession with the consent and concurrence of the crown. It seems to me, that if an information had been filed against him as an intruder, it would have been a good answer in point of law, for him to shew, that by licence from the crown, he was in possession and in the actual occupation of the land. There is a material distinction between what is essential to be done to convey a title from the crown, so as to take away its right, and what is necessary to be done to confer a privilege so as to prevent a party exercising that privilege from being a wrong doer. A title to crown land can only be acquired by matter of record, but the crown may by parol confer privileges so as to take away from itself the power of treating the party exercising the privilege as a wrong doer. A corporation can only grant by deed, yet there are many things which a corporation has power to do otherwise than by deed. It may appoint a

bailliff, and do other acts of the like nature. It appears to me, then, that the plaintiff was in the actual possession of the land, and notwithstanding the authorities cited from *Leonard and Godbolt*, I am of opinion, that actual possession of crown land, with the consent of the crown, is sufficient to entitle the party possessing it to maintain trespass against persons who have no title at all, and who are mere wrong doers.

The only remaining question is, whether there was sufficient evidence to shew, that this was a public foot-way, at the time when the action was commenced. By the enclosure act, which passed in 1805, all roads which had previously existed were to be discontinued, unless the commissioners otherwise directed by their award. Now, there was no such provision in the award as to this foot-path; but it appeared, that since 1805 it had been used by the public, and it was argued, that such user was sufficient to warrant a court of law in holding it to be a public road. But the right of soil is in the crown, and this cannot be a public way by dedication, unless there be some evidence to shew, that the owner has consented to such user. *Wood v. Veal* (a), is an express authority to shew that the consent of the lessee is not sufficient for that purpose, because it cannot bind the owner of the inheritance. It was there held, that the owner of the fee when the lease expired, had a right to prevent the public from going along the road, notwithstanding it had been used by the public during the term. Besides, I think also, that there was not sufficient evidence to warrant a conclusion, that this road was used with the consent of any person

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in the occupation of the land. Upon the whole, therefore, I am of opinion, that the rule for a new trial ought to be discharged.

HOLROYD J. After the very clear exposition of the law applicable to this subject by my brother *Bayley*, and the comments which he has made on the different cases, it will not be necessary for me to give my opinion at any length. I agree that the plaintiff took no legal estate from the crown, because the provisions of the statute 1 Ann. c. 7. s. 5. have not been complied with, and he could not, therefore, maintain an action of ejectment, because he could not make any lease to vest an interest in the nominal plaintiff. The action of ejectment, and the action of trespass are very different in their nature. It is clearly established with respect to private property, that trespass may be brought by a person in the actual possession against a wrong doer, or a person who has no right to enter upon the land, or to do any act which is an injury to the actual possession. And, although there appears to be some difference between the circumstances of the case in *Aleyn*, and that in 4 *Leonard*, 184, inasmuch as in the former there may be ground for saying that the crown was not entitled to possession of the land until office found, I think that the latter case explained as it is by the case in the year book, 19 Ed. 4., shews that the same rule of law applies to an intruder upon the possession of the crown, as to a person wrongfully in the possession of private property. If the crown had treated the plaintiff as an intruder, and had proceeded against him as a person in the wrongful occupation of the land, that might have made it a very different case; but so far from any thing

thing of that kind having taken place, the occupation by the plaintiff appears to have been by the permission of the crown. That permission was not sufficient to vest in him the legal interest in the land. As between the crown and the plaintiff, the right of possession was not taken away from the crown, as it would have been if the owner of the land had been a private person. The parcel demise then would have created a tenancy from year to year, or a tenancy at will. But, although that is not so as to land belonging to the crown, yet, I think, the actual occupation of crown land, and enjoyment of the profits, does, as between the person in such enjoyment and possession and a mere stranger, constitute a right which entitles the former to maintain trespass against any person coming to deprive him of any of the fruits of that possession. The doctrine laid down in the case in *Leonard* is consistent with the principles which prevailed in earlier times. According to the old rule it was an answer to an action of trespass brought against a wrongdoer for the defendant to shew that the right of soil was in a third person. For, although it was necessary for a defendant to allege in his plea that he entered by the command of the owner of the soil, the plaintiff was not at liberty to traverse the command. But that doctrine has been overruled by later cases. The law now is, that an entry on the possession of another cannot be justified, unless it be made by the authority of a person in whom the right of soil is vested. So, in this case, the question was not whether the plaintiff had a legal title to the land, but assuming that he could not retain the actual possession against the crown, the question was, whether he was entitled to that possession against a third person, as the crown

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crown did not treat him as a wrong doer. Although he could not retain the possession against the king, I think he may maintain trespass against a wrong doer, but even against him he cannot maintain ejectment.

It appears to me, that the payment of the rent, the exercise of the privilege of shooting over the land, and the actual cutting of the grass by the plaintiff's permission, was sufficient evidence to go to the jury, and for them to find that the plaintiff was in the actual possession of all but the trees. The actual taking of the grass by *Wallace* did not divest the plaintiff of his possession, because the former took it not in his own right, but by permission of the plaintiff, and retained it only by his permission. I think there is no pretence for saying that there was any dedication of the way to the public.

LITLEDALE J. I am of the same opinion. Generally speaking, trespass may be maintained by a person in the actual possession of land against a wrong doer, even where that possession may be wrongful as against a third person. If a tenant hold over after the expiration of his lease, or incur a forfeiture by committing waste or otherwise, the landlord would have a right to enter, and as against him the tenant would have no right of possession; yet if the landlord permitted him to continue in the actual possession, he might maintain trespass against any person entering upon him, not having a better title than himself. A party, therefore, may be in such a situation, that he may be turned out himself, by a person having a better title, but not by a stranger. *Graham*
 v. *Peat*

v. *Peat* (a) is a very strong case upon this subject. There the plaintiff was in possession of glebe land, under a lease which had become void by the non-residence of the rector, and it was held, that after the lease had become void, the lessee had a sufficient possession to enable him to maintain trespass against a wrong doer; and the rector who had rendered this lease void by his own non-residence, afterwards recovered possession of the land in ejectment, *Frogmorton d. Fleming v. Scott*. (b) That is a direct authority to shew that a party having no title as against his landlord, may still maintain trespass against a wrong doer. The case in 4 *Leonard* 184., which is very loosely reported, is the only authority for the position, that an intruder on the possession of the crown cannot maintain trespass, but that probably was considered to be new law, for one of the judges did not agree to the decision, and it was subsequently overruled by the case of *Johnson v. Barrett*, although, perhaps, that case may more properly apply where office is necessary to entitle the crown to possession. I, however, cannot consider that a person who is in possession of land by permission of the crown, although without title, is an intruder. The plaintiff here does not claim under the crown any interest for life, or for years; he merely claims the actual possession. Perhaps the crown might call upon him to account for the whole profits which he has received from the land; but it does not therefore follow that he may not have as much right to maintain an action against a wrong doer, as the plaintiff in *Graham v. Peat* (c), for there the rector afterwards re-

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(a) 1 *East*, 244.(b) 2 *East*, 467.(c) 1 *East*, 244.

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covered the premises in ejectment, and was, of course, entitled to the profits of the land. I am, therefore, of opinion, that so long as the plaintiff had the land by licence from the crown, he had a sufficient possession to enable him to maintain trespass against a wrong doer. I also think that there was sufficient evidence for the jury to find that he was in the actual occupation of the land, and that there was no proof of a dedication of the way to the public. The rule for a new trial must, therefore, be discharged.

Rule discharged.

WRIGHT *against* COURT and Others.

A constable arresting a man on suspicion of felony must take him before a justice to be examined as soon as he reasonably can, therefore a plea justifying a detention for three days, in order that the party whose goods had been stolen might have an opportunity of collecting his witnesses and bringing them to prove the felony, was held bad on demurrer. Semble, that a constable cannot justify handcuffing a prisoner unless he has attempted to escape, or unless it be necessary in order to prevent his doing so.

TRESPASS and false imprisonment. The declaration alleged that the defendants on the 3d of *November* 1824, assaulted and imprisoned the plaintiff upon an unfounded charge of felony, and kept him so imprisoned till the 6th of *November*, when they handcuffed him and took him before a justice, and there again imprisoned him for 12 hours. Plea first, not guilty; secondly, as to the assaulting and imprisoning the plaintiff for the space of time in the declaration first mentioned, and afterwards handcuffing him, and taking him before a justice, and imprisoning him there for the time secondly mentioned in the declaration, defendants said, that a felony had been committed in the warehouse of one *Clarke*; the plea then stated circumstances from which they suspected that plaintiff was concerned in the felony, wherefore *Court* being a constable, and the others as his

assistants

assistants took plaintiff and imprisoned him for the space of time in the declaration mentioned in that behalf, in order to carry him before a justice, the same being a reasonable time for that purpose and for the purpose of informing *Clarke* of the apprehension of the plaintiff upon such suspicion, and for the purpose of enabling *Clarke* to procure the necessary evidence, and collect the necessary witnesses, to prove the facts of the said felonious stealing, &c.; and the defendants further said, that on the said 6th of *November* they handcuffed plaintiff as in the declaration mentioned, in order to prevent his escape, and took him so handcuffed before a justice, to be then and there interrogated and examined touching the said felony, and the justice directed him to be detained for further examination; wherefore defendants again imprisoned him for the space of time in the declaration in that behalf mentioned. There were other pleas similar in substance. Demurrer and joinder.

Curwood in support of the demurrer contended, that the causes of suspicion mentioned in the plea were insufficient.

Oldnall Russell contra, contended that they were reasonable grounds of suspicion, and, therefore, a justification to the constable and his assistants.

Per Curiam. The plaintiff alleges that he was imprisoned for three days, and the first special plea admits that he was imprisoned for that space of time before he was taken to the magistrate for examination, and avers that it was a reasonable time for that purpose, and for enabling *Clarke* to collect and bring his witnesses

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to prove the felony. But it is the duty of a person arresting any one on suspicion of felony to take him before a justice as soon as he reasonably can (a), and the law gives no authority even to a justice to detain a person suspected, but for a reasonable time till he may be examined. (b) The justice might have been justified in ordering this plaintiff to be detained until *Clarke* could bring his witnesses, but it is clear that the defendants had no authority to detain him without such order. The defendants have also justified handcuffing the plaintiff in order to prevent his escape, but they do not aver that it was necessary for that purpose, or that he had attempted to escape. For these reasons the special plea is insufficient, and judgment must be given in favor of the plaintiff.

Judgment for the plaintiff.

(a) *Com. Dig.* Imprisonment, H. 4.

(b) *Id.* H. 5.

The KING against MONTAGUE and Others.

A public right of navigation in a river or creek may be extinguished either by an act of parliament or writ of *ad quod damnum* and inquisition thereon, or under certain circumstances by

INDICTMENT for cutting a trench across a common and ancient King's highway, leading from the parish of *Hoo*, in the county of *Kent*, unto and through the parish of *Stoke* in the county aforesaid, and thence unto and into the parish of *Saint James* in the *Isle of Grain* in the said county, used for all the King's subjects with horses, carts, and carriages, &c. Plea, not guilty. At commissioners of sewers, or by natural causes, such as the recess of the sea or an accumulation of mud, &c., and where a public road obstructing a channel (once navigable) has existed for so long a time that the state of the channel at the time when the road was made cannot be proved; in favor of the existing state of things it must be presumed that the right of navigation was extinguished in one of the modes before mentioned, and the road cannot be removed as a nuisance to that navigation.

Every creek or river into which the tide flows is not on that account necessarily a public navigable channel, although sufficiently large for that purpose, per *Bayley J.*

the

the trial before *Graham B.* at the *Surrey* summer assizes, 1824, (the indictment having been removed into that county for trial by rule of this court) it appeared in evidence that the road in question was an embankment across *Yantlet Creek*, which runs on the west side of the *Isle of Grain*, and unites the *Thames* and the *Medway*. The defendants cut down the embankment by order of the corporation of *London*, who contended that *Yantlet* was a public navigable stream, and that the road improperly obstructed it. It was proved that from time to time during the last 20 years the road had been raised by the inhabitants of *Stoke* and *Grain*, and had during all that time been made so high that no boats could pass over it at any time, but for 30 or 40 years preceding, light boats drawing but little water had occasionally been able to pass over for half an hour before and after high water, and several instances of their having done so were spoken to by the witnesses. When the embankment or road had been removed, the remains of an ancient bridge were discovered; it appeared to have been of considerable dimensions both in height and width, but no evidence could be adduced as to the time when it was erected, or when it fell to decay, nor to shew for what purpose it was built, whether for the purposes of the navigation of the creek, or merely to support the road from *Stoke* to the *Isle of Grain*. But it was contended for the defendants that the size of the arch being sufficient for navigation, and greater than was necessary for the purposes of the road, it must be presumed to have been so constructed in order that it might not impede an existing navigation; and that if there had at any time been a public navigation through the creek, it could not be legally put an end to without

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an act of Parliament. The learned judge in summing up assumed that there had been a public navigation through the creek, but said it was probable that it had been obstructed by a natural deposit of silt and mud, and that the bridge might, on that account, have been suffered to go to decay, and the causeway made in lieu of it. That the only evidence of actual navigation was by very small boats at certain periods of the tide, and that the defendants could not at all events justify cutting away the embankment more than was necessary to open the navigation to such boats to the extent spoken of by the witnesses. The jury having found the defendants guilty,

Gurney, in *Michaelmas* term, obtained a rule nisi for a new trial, upon the ground that the learned Judge ought to have left it to the jury to say whether there had been anciently a public navigation through *Yantlet* creek, and should have told them that such a navigation could be put an end to by an act of parliament alone, according to the doctrine laid down by *Holroyd J.* in *Vooght v. Winch.* (a)

Marryat (with whom were *D. Pollock* and *Platt*) shewed cause, and *Gurney*, the *Recorder of London*, the *Common Serjeant*, *Bolland*, *Tindal*, *Law*, and *Mirehouse* supported the rule. The case was very elaborately argued. On the one hand it was contended that the evidence did not prove that a public navigation had ever existed in the creek; on the other, that there was sufficient evidence in that respect, and that it should have been left to the jury to decide upon it.

(a) 2 B. & A. 670.

BAYLEY J. I am of opinion that there ought not to be a new trial in this case. It has been urged that it ought to have been left to the jury to decide whether there had or had not been a public navigation through *Yantlet* creek; but the learned Judge appears to have put the case even more favorably for the defendants, for the whole of his summing up was founded upon a supposition, that at some far distant period there was such a navigation. Even if there had been a defect in the direction in that respect, we ought not to grant a new trial, if we are satisfied upon the evidence either that there never was a public navigation, or that it had been legally put an end to. It was for the defendant to make out that there once was a public navigation. Now it does not necessarily follow, because the tide flows and reflows in any particular place, that it is therefore a public navigation, although of sufficient size. In *The Mayor of Lynn v. Turner* (a), which was error from the Common Pleas, it appeared that *Turner* brought case against the corporation of *Lynn* for not repairing and cleansing a certain creek or fleet, called *Dowshill Fleet*, into which the tide of the sea was accustomed to flow and reflow, as from time immemorial they had been used, whereby the sea was prevented from flowing therein, so that the creek was rendered unnavigable, and the plaintiff obliged to carry his corn round about. The second count contained no allegation of special damage. Judgment by default, and damages assessed on a writ of enquiry. For the plaintiff in error it was contended that the second count was bad, for that the declaration shewed the locus in quo to be a navigable river, that it was therefore pub-

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(a) *Cowp.* 86.

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lic, and no individual could maintain an action for an injury to it without shewing special damage. But Lord *Mansfield* says, "How does it appear that this is a navigable river? The flowing and reflowing of the tide does not make it so, for there are many places into which the tide flows which are not navigable rivers, and the place in question may be a creek in their own private estate." Again, in *Miles v. Rose (a)*, *Gibbs C. J.* says that the flowing of the tide, though not absolutely inconsistent with a right of private property in a creek, is strong *prima facie* evidence of its being a public navigable river; and *Heath J.* expresses the same opinion. The strength of this *prima facie* evidence arising from the flux and reflux of the tide, must depend upon the situation and nature of the channel. If it is a broad and deep channel, calculated for the purposes of commerce, it would be natural to conclude that it has been a public navigation; but if it is a petty stream, navigable only at certain periods of the tide, and then only for a very short time, and by very small boats, it is difficult to suppose that it ever has been a public navigable channel. [The learned Judge then commented at length upon the evidence, to shew the probability that there never had been a public navigation through the creek in question.] But even supposing this to have been at some time a public navigation, I think that, from the manner in which it has been neglected by the public, and from the length of time during which it has been obstructed, it ought to be presumed that the rights of the public have been lawfully determined. Most probably the rights of the public (if they ever had any) arose from the flux

(a) 5 Taunt. 706.

and

and reflux of the tides of the sea, so as to make the channel navigable. If then the sea retreated, or the channel silted up, so as to be no longer navigable, why should not the public rights cease? If they arose from natural causes, why should not natural causes also put an end to them? But they might also be put an end to by act of parliament, or by writ of *ad quod damnum*, and, perhaps, by commissioners of sewers, if there were any appointed for the district, and they found that it would be for the benefit of the whole level. For these reasons it appears to me, that if this case were sent down for trial again, the jury would be bound to find either that there never was a public navigation through the locus in quo, or that it had been determined by some lawful means. The rule must therefore be discharged.

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HOLROYD J. I also think that a proper verdict was found in this case. From the great length of enjoyment of the road across *Yantlet* creek, every reasonable presumption is to be made that it was lawfully formed. The defence set up against the indictment is, that there was a public right of navigation there, and that the embankment was an obstruction to it. The evidence leads to a conclusion, that there never was a public right of navigation; but admitting it to have existed at some former period, another question arises, viz. whether it may not have been extinguished. It appears by the report of *Vooght v. Winch*, that I then stated that a public right of this description could only be determined by an act of parliament. I am bound to correct that opinion, for upon looking into the authorities, I am satisfied that it may be done by a writ of *ad quod damnum*, and

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an inquisition found thereupon by a jury. So, also, it may be extinguished by natural causes. In *Com. Dig. Chimin*, (A 1.), it is said "A navigable river is in the nature of a highway, and if the water alters its course, the way alters, per *Thorp*, 22 Ass. 93," and in that book, it is thus stated "*et nota. Thorp* saith, If a water be a high street, which water by its own force changes its course upon another soil, yet it shall have there the same high street as it had before in its ancient course, so that the lord of the soil cannot disturb the new course," which is not merely the dictum of *Thorp* J. but he states it to have been so held in the case of *Nottingham*. It seems, therefore, that the right of way which existed on account of the navigation of the river, ceased in the original channel when the river changed its course, but followed the river to its new course. If then the water of the sea recedes so that a stream formerly navigable ceases to be so, why should not the rights of the public be extinguished, particularly where other rights have been superinduced, as the right of way in the present case? The right of way might also be extinguished by writ of *ad quod damnum*. In *Fitz nat. Bre.* 515, it is said, "If there be an ancient trench or ditch coming from the sea, by which boats and vessels use to pass to the town, if the same be stopped in any part by outrageousness of the sea, and a man will sue to the king to make a new trench, and to stop the ancient trench, &c., they ought first to sue a writ of *ad quod damnum* to inquire what damage it will be to the king or others." There is no doubt that such a public right may be extinguished by act of parliament. In favor of the long enjoyment of the road in its present state, I think that we are bound to presume, that if a right of public navigation ever existed,

it was determined by one or other of the means to which I have alluded, and, if that were so, the defendants were properly found guilty.

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LITTTLEDALE J. I am of the same opinion. There were two questions in this case; first, whether anciently this was a continuing subsisting navigation used by the public; and, secondly, whether that was put an end to by legal means. Upon looking through the evidence, I think that this never was a continuing subsisting navigation used by the public. But supposing it to have been so, then was it legally put an end to? That might be done by act of parliament, by writ of *ad quod damnum*, and, I conceive, under certain circumstances by commissioners of sewers. I agree that, in order to quiet possessions, we ought to make all reasonable presumptions in favor of the existing state of things. But I am not disposed to act upon the presumption, either of an act of parliament, or a writ of *ad quod damnum*, or proceedings by commissioners of sewers, unless there be some evidence to warrant that presumption. In the present case, it appears to me a more reasonable presumption, that the passage, if it ever existed, was stopped up by natural causes, by the recess of the sea, or by an accumulation of silt and mud, which we know by experience is constantly going on in many of the harbours of this country, and by which they would eventually be choked up, unless artificial means of cleansing them were adopted. For these reasons I think that the verdict ought not to be disturbed.

Rule discharged.

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DOE on the Demise of MORECRAFT *against*
MEUX and Others.

Where a lease contained covenants to keep the premises in repair, and to repair within three months after notice, and a clause of re-entry for breach of any covenant, and the premises being out of repair, the landlord gave a notice to repair within three months: Held, that this was a waiver of the forfeiture incurred by breach of the general covenant to keep the premises in repair, and that the landlord could not bring ejectment until after the expiration of the three months.

EJECTMENT for the recovery of certain premises in the parish of *St. Paul, Covent Garden*, in the county of *Middlesex*. The demise was laid on the 27th of *December* 1823. At the trial before *Abbott C. J.*, at the *Westminster* Sittings after Trinity Term, 1824, a verdict was found for the plaintiff, subject to the opinion of this Court upon the following case. The lessor of the plaintiff on the day of the demise and still, was and is landlord of the premises in question. By indenture of lease made the 1st of *June* 1769, between *S. Rowley* and *J. Rowley* of the one part, and *J. Chase* and *J. Cox* on the other, part, *S. Rowley* and *J. Rowley* demised the premises in question to *J. Chase* and *J. Cox*, for seventy-three years and a quarter, from *Lady-day* 1769, with the usual reddendum and covenant, to pay rent, and containing covenants of the lessees for themselves and assigns, and a clause of re-entry, as follows: "And the said *J. Chase* and *J. Cox*, for themselves, their executors, &c., do and each of them doth covenant, that they, their executors, &c., shall and will, at their own proper costs and charges, from time to time and at all times hereafter, during the term hereby granted, when and as often as need shall be, well and sufficiently repair, support, and keep the said messuage, &c. in, by, and with all and all manner of needful and necessary reparations and amendments whatsoever, and so yield them up at the end of the term. And further, that it shall and may

be lawful to and for the said *S. Rowley* and her assigns, during the continuance of her estate in the said demised premises, and after the determination thereof, to and for the said *J. Rowley*, his heirs, and assigns, &c., at her, his, or their free wills and pleasures, at any convenient hour in the day time, twice, or oftener in every year of the said term, to enter upon the premises, and see the state and condition of the reparations of the same; and of all defects and want of reparations then and there found, to give or leave notice or warning in writing, at the said demised premises, unto or for the said *J. Chase* and *J. Cox*, their executors, &c.; to repair and amend the same within three calendar months then next ensuing; within which space of three months the said *J. Chase* and *J. Cox*, for themselves, their heirs, executors, &c., do covenant to repair and amend all such defects, of which such notice or warning shall be so given. Proviso for re-entry if *Chase* and *Cox*, their executors, &c., shall not perform, fulfil, and keep all and singular the covenants in the said lease, to be by them performed, &c." The said term and interest in the premises, vested in the defendants, before the dilapidations and notice to repair hereinafter mentioned. The premises being in some respects out of repair, the lessor of the plaintiff on the 7th of *August* 1823, caused a written notice to repair to be served on the defendants, requiring them to do certain necessary repairs therein mentioned, within three months then next following, in these words: "I do hereby require you to repair and amend the same within the space of three calendar months, from the delivery of this notice, as witness my hand this 6th day of *August* 1823. W. Morecraft." On the 24th of *October* 1823, the lessor of the plaintiff

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received of the defendants *half a year's rent*, to September 29th, 1823. The declaration in ejectment in this cause was served on the 28th of October 1823, being previously to the expiration of the said three months' notice to repair. The premises were and continued out of repair from the time of serving the said notice to repair, until the time of the trial of this action.

Chitty, for the plaintiff. The covenants in this lease to keep the premises in repair generally, and to repair within three months after notice, are independent covenants, and a breach of either operated as a forfeiture of the lease. The case in this respect differs from *Horsefall v. Testar* (a), where all that related to the repairs was one covenant. It will, perhaps, be urged, that the notice to repair which was given in this case, operated as a waiver of the forfeiture; but it could not have that effect, being analogous to a second notice to quit, which has been held not to be a waiver of the first. In *Roe d. Goatly v. Paine* (b), it appeared that a lease had been made with covenants similar to those in question, viz. to keep the premises in repair, and to repair within three months after notice. The landlord gave a notice to repair forthwith, and brought ejectment within three months after giving that notice, and Lord *Ellenborough* held, that the notice was not a waiver of the forfeiture. The word *forthwith* in that notice may be relied on as making a distinction, but if the covenants are independent, the notice to repair within three months cannot affect the forfeiture incurred by

(a) 7 Taunt. 385.

(b) 2 Campb. 520

a breach of the general covenant to keep the premises in repair at all times during the term.

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Brougham contra, was stopped by the Court.

BAYLEY J. The landlord in this case had an option to proceed on either covenant, and after giving notice to repair within three months, he might have brought an action against the defendant upon the former covenant for not keeping the premises in repair. But that is very different from insisting upon the forfeiture. It is said that the premises being out of repair on the 6th of *August*, when the notice was given, the lease was thereby forfeited. But the landlord has affirmed that the lease subsisted up to the 29th of *September*, by receiving the rent which became due at that period. It is plain, therefore, that he did not intend to insist upon an immediate forfeiture at the time when the notice was given, and I think that notice amounted to a declaration that he should be satisfied if the premises were repaired within three months, and that he thereby precluded himself from bringing an ejectment before the expiration of that period. In *Doe v. Paine* the language of the notice was very different, the tenant was required to put the premises in repair *forthwith*; that did not prevent the landlord from bringing his ejectment at any time. That case, therefore, is no authority for the present lessor of the plaintiff, and for the reasons already given I think that our judgment must be for the defendants.

HOLROYD J. I am of opinion that this ejectment was brought too soon, for it appears to me that the notice requiring

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requiring the tenant to repair within three months was equivalent to an admission that the tenancy would continue up to the expiration of that time. If it did not operate as a waiver of the forfeiture incurred by breach of the covenant to keep the premises in repair, the landlord might be able to bring ejectment after the tenant had put the premises into complete repair pursuant to the notice; which would be extremely unjust. But I think that although the action for breach of covenant would remain, yet the forfeiture was waived. The defendants are, therefore, entitled to our judgment.

LITLEDALE J. concurred.

Postea to the defendants.

DOE d. BOSNALL *against* HARVEY.

Testator being seised in fee of lands in gavel-kind devised all his real estate unto his nephew T. C. for and during the term of his natural life, and from and after

EJECTMENT for premises in *Cowden*, in *Kent*. At the trial before *Graham B.*, at the summer assizes for the county of *Kent*, 1824, the jury found a special verdict, stating that one *Nicholas Chapman* was seised in fee of three undivided fourth parts of certain lands, the determination of that estate to trustees to preserve contingent remainders and from and after the decease of T. C. to and amongst all and every the heirs of the body of the said T. C. as well female as male, such heirs, as well female as male, to take as tenants in common, and not as joint tenants, and for default of such issue to trustees for a term of 500 years, upon trust that they should as soon as might be after the decease of T. C., in case he should die without issue of his body lawfully begotten, raise a sum of money to be applied to the maintenance of his niece, and after the determination of the said term of 500 years he devised the same to his nephews T. C. and C. C. for and during their respective natural lives, to take as tenants in common, and not as joint tenants, and from and after their respective deceases unto and amongst all and every the heirs of the respective bodies of the said T. C. and C. C., as well female as male, lawfully begotten or to be begotten, such heirs to take as tenants in common and not as joint tenants, and in default of such issue to his own right heirs for ever: Held, that T. C. took an estate tail in the devised premises.

messages,

messuages, and premises, at *Cowden*, in the county of *Kent*, and of three undivided fourth parts of a moiety of the manor of *Cowden*, which were respectively of the tenure of gavelkind, and being so seised, made and published his last will, bearing date the 16th of *Feb.* 1763, executed so as to pass freehold estates, and thereby devised as follows. After giving several pecuniary legacies, which it is unnecessary to mention. "Also, I give and devise all other my manors, messuages, or tenements, houses, buildings, lands, hereditaments, and *real estate* whatsoever and wheresoever, subject nevertheless, and liable to the payment of so much money, as my personal estate shall fall short of, or be deficient in paying my debts and legacies, unto my said nephew *Thomas Chapman*, for and during the term of his natural life. And from and after the determination of that estate, I give and devise the same unto *Thomas Richardson* and *Nicholas Lock*, and their heirs, during the life of the said *Thomas Chapman*, to the intent to preserve and support the contingent uses and remainders hereinafter limited; but, nevertheless, in trust, to permit my said nephew *Thos. Chapman* to receive the rents and profits thereof during his natural life; and from and after the decease of my said nephew, *Thos. Chapman*, then I give and devise the same to and amongst all and every the heirs of the body of the said *Thos. Chapman* as well female as male, lawfully to be begotten, such heirs as well female as male to take as tenants in common, and not as joint tenants, and for default of such issue, [I give and devise the same premises unto the said *Thos. Richardson*, and *Nichs. Lock*, and the survivor of them, his heirs and assigns, for and during the term of 500 years, upon trust, that they the said *Thos. Richardson*, and *Nichs. Lock*, shall, and do as soon as conveniently may be after the

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the decease of the said *Thos. Chapman*, in case he shall die without issue of his body lawfully to be begotten, but not otherwise, raise thereout, either by sale or mortgage, as they shall think fit, the sum of 300*l.* of lawful money of *Great Britain*, and place the same out at interest on government or other securities, and pay and apply the whole or such part of the interest or produce thereof, as they or the survivors of them shall think proper, towards the maintenance and education of my niece *Ann Chapman*, sister of my said nephew *Thos. Chapman*, until she attains her age of twenty-one years, in case the said *Thos. Chapman* shall happen to die without issue before she attains the age of twenty-one years. And when she shall have attained her said age of twenty-one, then, and in case of the death of the said *Thos. Chapman* without any lawful issue as aforesaid, I give and bequeath the same 300*l.*, together with all such interest or produce thereof as shall not have been applied for the purposes aforesaid unto her my said niece, and from and after the end and expiration, or otherwise sooner determination of the said term of 500 years and subject thereto,] (a), I give and devise the same unto my said two nephews, *James Chapman* and *Charles Chapman*, for and during their respective natural lives, which nephews are to take as tenants in common, and not as joint tenants. And from and immediately after their respective deceases, I give and devise the same premises unto and amongst all and every the heirs of the respective bodies of the said *J. Chapman* and *C. Chapman* as well female as male lawfully begotten or to be begotten, such heirs to take in common, and not as joint tenants; and

(a) The clauses of the will between the brackets were not set out in the special case stated for the opinion of the Court in *Doe on d. Chapman v. Howell*.

for

for want and default of such issue, I give and devise the same premises unto my own right heirs for ever." The testator after disposing of other parts of his personal property, appointed *Lock* and *Richardson* executors of his will. The special verdict then stated the following facts: the death of the testator, and entry of *Thomas Chapman*; his death in 1789, without having suffered any recovery or levied a fine; that he left six sons and two daughters surviving him, viz. *James C.*, *Henry C.*, *William C.*, *Charles C.*, *Nicholas C.*, *George C.*, *Sarah Chapman*, and *Mary Chapman*. In 1809, *Sarah Chapman*, married with *John Bagnall*, who died in 1817. *Mary Chapman*, in 1788, intermarried with *John Mann*, who died in 1789, and afterwards intermarried with *Charles Mann*, who died in 1821; (they *Sarah Bagnall* and *Mary Mann*, the two daughters of *Thomas Chapman*, being the lessors of the plaintiff;) *James Chapman*, one of the brothers, died in 1792, a bachelor, without having levied any fine, or suffered a recovery; *Henry Chapman* and *William Chapman* also died without levying a fine or suffering a recovery, but each of them left a son. *Charles Chapman* and *Nicholas Chapman*, and *George Chapman* conveyed their interest in the devised premises to the defendant, (which in the deeds of conveyance was stated to be the four-fifths) and covenanted that the infant sons of their deceased brothers, should, as soon as they came of age, convey the other fifth. This ejectment was brought to recover two-eighth parts of the lands devised on the supposition that *Thos. Chapman*, the first taker, had an estate for life only, and that his children took as tenants in common. The case was now argued by

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Abraham, for the lessors of the plaintiff. *T. Chapman* took under this will an estate for life only, and his chil-

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dren took an estate tail by purchase. The words "heirs of the body" are to be considered as words of purchase and not of limitation. The rule in *Shelley's case* (a) will be relied on by the defendant. That rule is, that if the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately to his *heirs* in fee or tail, the words "*the heirs*" are words of *limitation* of the estate and not words of *purchase*. In *Fearne's* contingent remainders (b), the several authorities on this subject are collected and commented on, and the conclusion drawn from them is, that where it appears to be the testator's general intent that all the heirs of the body of the tenant for life should inherit; the particular intent is disregarded, and in order to give effect to the general intent the words "heirs of the body" have been held to be words of limitation, and the ancestor to whom the freehold is given takes an estate tail; which may, by possibility, let in all the heirs of the body in succession. Although that be the general rule, yet if it appear from the other parts of the will that the testator intended to give the ancestor a life estate only, then, notwithstanding the gift to the heirs of the body, the devise will be so construed as to give effect to that intention, *Leonard v. The Earl of Sussex*. (c) *Papillon v. Voice*. (d) It is true, those were cases of trust, and the estate was not executed, but executory. But even as to common law conveyances, if after the devise to the heirs of the body, subsequent words are engrafted ~~thereon~~, inconsistent with the nature of the descent implied by the first words, then the words "heirs of the body" have been construed to be words of purchase, and not of limitation, *Doe v. Laming*. (e) In that case there was

(a) 1 Co. 93.

(d) 2 P. Wms. 471.

(b) Chap. 1. s. 5.

(c) 2 Burr. 1100.

(e) 2 Vernon, 526.

a devise of gavelkind lands to *A.* and the heirs of her body lawfully begotten, or to be begotten, as well *females as males*, and to their heirs and assigns for ever, to be divided equally, *share and share alike, as tenants in common and not as joint tenants*, it was held, that the words "heirs of her body" did not operate as words of limitation, nor, consequently, create an estate tail in *A.* For those words did not stand independent and unqualified, but were corrected and explained very expressly by the words which followed and were coupled with them; inasmuch as the words, "as well females as males" annexed to the words "heirs of the body," were incompatible with and expressly broke the descent, because gavelkind lands cannot descend in that manner, and the devise expressly created a tenancy in common, which was impossible by descent, as that must have been in coparcenary. That case is precisely similar to the present, for here the lands are gavelkind, and the devise is nearly in the same terms; and one of the grounds of the decision in that case applicable to the present was, that the words "heirs of the body" were expressly qualified, and explained to mean females as well as males; and as females cannot by the tenure of gavelkind take by descent, those words must be considered as a description of the individual persons to whom the estate was to go after the death of the first devisee. That the rule does not extend to those cases where the words "heirs of the body" are, by other words of reference or qualification, explained or restrained to the sense of "first and other sons," is confirmed by the case of *Goodtitle v. Herring*. (a) There the devise was to *A.* for her life, without impeachment of waste, remainder to trustees to preserve contingent remainders; remainder to the heirs male of the body of *A.* to be begotten, severally and suc-

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(a) 1 *East*, 264.

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cessively in remainder, one after another, according to seniority, the elder of *such sons*, and the heirs male of his body, being always preferred to the younger of such *son and sons* and the heirs male of their bodies; and, *in default of such issue*, to the daughter and daughters of the body of *A.*, as tenants in common in tail, remainder over. There it was held that *the heirs male of her body* were descriptive of the persons whom the testatrix afterwards called *son and sons*. From this case, therefore, it may be collected, that where an estate is devised to a person for life, with remainder to his heirs or the heirs of his body, and there are words of explanation annexed to the word *heirs*, from whence it may be collected that the testator meant to qualify the meaning of the word *heirs*, and not to use it in a technical sense, but as a description of the person or persons to whom he intended to give his estate, after the death of the first devisee, the word *heirs* will, in that case, operate as a word of purchase. Now here there are words in the will to shew that the testator did not use the words "heirs of the body" in their technical sense, to denote all the descendants of the first taker, but as a description of the individual persons to whom he intended to give his estate after the death of the first devisee; for if the words "heirs of the body" were used in their technical sense as words of limitation, the lands being gavelkind, the females could not take by descent, and neither males nor females could take as tenants in common, but as coparceners only. In order, therefore, to effectuate the intention of the testator, that females should take as well as males, and that they should take as tenants in common, the words "*heirs of the body*" must be construed to be words of purchase. [Bayley J. All the males and all the females might take successively.]

successively.] That might lead to an indefinite postponement of the females, and the testator intended that they should take *pari passu* with the males. [*Littledale J.* They might take by representation. Suppose *Thomas Chapman* had six sons, and one of them died in the lifetime of his father, leaving a daughter, that daughter would take her father's share by way of representation.] In *Doe d. Chapman v. Covell (a)*, a question came before this Court on a special case upon the construction of this very will, and Lord *Ellenborough, Bayley J.* and *Holroyd J.*, were of opinion that *T. Chapman* took an estate for life, and that his children took a fee under the devise of "all the testator's real estate."

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Polson contra. The case of *Doe d. Wright v. Jesson (b)*, is an authority expressly in point to shew that in this case *Thomas Chapman* took an estate tail. In that case the devise was to *William Wright* for life, and, after his decease, to the heirs of his body, in such shares and proportions as *W.*, by deed, &c., should appoint; and, for want of such appointment, to the heirs of the body of *W.*, share and share alike, as tenants in common; and if but one child, the whole to such only child; and for want of *such* issue, to the heirs of the devisor. The Court of King's Bench held, that *William Wright* and his children took only estates for life; and one of the grounds of that decision was, that a tenancy in common was inconsistent with the supposition that the heirs of the body were to take as tenants in tail by descent, because one would take the whole. The House of Lords, however, afterwards reversed the judgment of the Court of *K.B.*, and held that *W. Wright* took an estate tail; and this case must be governed by that decision and by the

(a) *E. T.* 1816.(b) 2 *Bligh*. 2.

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principles there laid down by Lords *Eldon* and *Redesdale*. Lord *Eldon*, in addressing the house immediately after the argument, says, "The words *heirs of the body* *prima facie* mean all descendants; and it is a rule of law that all descendants should take under these words, unless they are clearly *qualified and restricted* by other words, so as to give them a more limited sense;" And afterwards, when he moved to reverse the judgment of the Court of King's Bench, he stated it to be definitively settled, "that where there is a particular and a general or paramount intent, the latter shall prevail, and Courts are bound to give effect to the paramount intent." And then, after stating the first devise to *W. Wright* for life, he says, "If we stop here, it is clear that the testator intended to give to *W. W.* an interest for life only." After stating the devise to the heirs of the body of *William*, he says, "If we stop there, notwithstanding he had before given an estate expressly to *William* for his natural life only, it is clear that, by the effect of these following words, he would be tenant in tail; and, in order to cut down this estate tail, it is absolutely necessary that a particular intent should be found to control and alter it, *as clear as the general intent here expressed*. The words 'heirs of the body' will, indeed, yield to a clear particular intent that the estate should be only for life; and that may be from the effect of superadded words, or any expressions shewing the particular intent of the testator; but that must be clearly *intelligible and unequivocal*." So in this case it is clear that the legal effect of the words "heirs of the body" is to vest an estate tail in *Thomas Chapman*, the general intent is, that all the descendants of *T. Chapman* shall take, and that intent must prevail, unless there be a contrary particular intent, *clearly and unequivocally expressed*.

expressed. The argument is, that the words "heirs of the body" must be construed to be words of purchase, because, first, the "heirs of the body" cannot take as tenants in common; and, secondly, that the lands being gavelkind, the females cannot take by descent as tenants in common, but they must take as coparceners. But in *Doe d. Wright v. Jesson* the heirs of the body could not take as tenants in common by descent, and the judgment of the Court of *K. B.* proceeded partly upon that ground. But it was held by the House of Lords that the words "tenants in common" did not overrule the words "heirs of the body," which had a settled technical meaning. Lord *Redesdale*, upon that subject, said "that it did not follow that heirs of the body should not take because they could not take in the mode prescribed. This only follows, that having given to heirs of the body, the testator could not modify that gift in the two different ways which he desired, and the words of modification are to be rejected." That observation applies fully to the present case, and the words of modification must be rejected. Besides, it is to be observed that females might take by representation: for example, if *T. Chapman* had several sons, and one of them died in his lifetime, leaving daughters only, those daughters might take as the representatives of their father; and, therefore, the words of the will might be satisfied in that respect. *Robinson v. Robinson* (a), *Doe v. Aplin* (b), *Doe v. Smith* (c), *Doe v. Cooper* (d), *Frank v. Stovin* (e), *Pierson v. Vickers* (f), and *Murthwaite v. Jenkinson* (g), are authorities in support of the proposition that a particular intent must give

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(a) 1 Burr. 38. 3 Brown, P. C. 180.

(b) 4 T. R. 82.

(c) 7 T. R. 531.

(d) 1 East, 229.

(e) 3 East, 548.

(f) 5 East, 548.

(g) 2 B. & C. 357.

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way to a general intent. As to *Doe v. Laming* (a), there words of limitation in fee were grafted on the words "heirs of the body," which could not have been satisfied by an estate tail in the ancestor.

ABBOTT C. J. It appears to be clearly established, by the authorities which have been cited, that a particular intent expressed in a will must give way to a general intent. It is also a clearly established rule of law, that where there is a gift by will of an estate of freehold to a particular individual, with remainder to *the heirs of his body*, the latter words are to be construed as shewing an intention on the part of the testator to include all the heirs of the body of the first taker, unless from other words of the will it clearly and unequivocally appears that those words are used to designate particular individuals. The legal effect of those words is (the remainder becoming immediately executed in possession in the person taking the freehold) to give to him an estate tail. Now in this case it manifestly appears, by the devise to the heirs of the body of *Thomas Chapman*, to have been the intention of the testator that his estate should remain in the family of *Thomas Chapman*, so long as that family should exist. The only way in which that intention can be effectuated is to construe the words "heirs of the body" to be words of limitation. That will have the effect of giving an estate tail to *Thomas Chapman*, and then the estate may descend to heirs female as well as male. It is true that the lands being gavelkind, those heirs cannot take by descent, as tenants in common; they must take as coparceners. But it is not to be inferred that, because the heirs of the body cannot take in the particular mode prescribed by the testator, he intended that they should not take at

(a) 2 Burr. 1100.

all. If the words "heirs of the body" be construed to be words of purchase, the general intent of the testator would be wholly defeated; for in that case the estate would go only to the children of *Thomas Chapman*; and if during his life all his children died leaving children, the grand-children of *T. Chapman* would not take at all, and the estate would not continue in his family. Besides, if those words be words of purchase, it is difficult to say that the children of *Thomas Chapman* could take more than an estate for life; and then, if they died leaving children, the grand-children would not take. If, on the other hand, the heirs of the body of *Thomas Chapman* took the fee, then all the limitations over would be defeated, which would be directly contrary to the intention of the testator. For these reasons it seems to me, that if the whole will had been presented to the Court on a former occasion, they would not have come to the conclusion which they did. Upon the best consideration I have been able to give to this will, I am of opinion that *Thomas Chapman* took an estate tail.

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BAYLEY J. I feel no difficulty in saying, that I think the decision pronounced on a former occasion on the construction of this will, and in which I concurred, was wrong. The general rule applicable to this subject is, that where, in a deed or will, there is a limitation of an estate of freehold to a man, and afterwards to the heirs of his body, so as to give it to the heirs as a denomination or class, (including the whole line of heirs,) the words "heirs of the body" are to be construed as words of limitation, and the heirs then take by descent; but where they are used to designate only certain individual persons answering the description of heirs at the death of the

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the donor or devisor, there they are words of purchase. (a) Now the words "heirs of the body" have, in general, a certain technical meaning, and include all descendants. I agree with the rule laid down by Lord *Redesdale* in *Doe v. Jesson*, "that technical words should have their legal effect, unless from subsequent inconsistent words it is very clear that the testator meant otherwise." The legal effect, therefore, of the devise to the heirs of the body of *Thomas Chapman*, was to give him an estate tail, unless it clearly appears from the subsequent words in the will, that the testator meant otherwise. Such other meaning is said to appear in this case, because the testator has directed that females should take as well as males, and that they should all take as tenants in common; and it is said that females could not take gavelkind lands at all by descent, and that the heirs of the body could only take as coparceners, and not as tenants in common. But cases may be put where females might take gavelkind lands by descent; for instance, suppose *Thomas Chapman* to have left no issue but daughters, then they would all take as coparceners; or supposing that he had sons only, and some of those sons died in his life time, leaving daughters only, those daughters would take by way of representation, together with the surviving sons of *Thomas Chapman*, and they would in that case answer the description of heirs of the body of *Thomas Chapman*. Then as to the other objection. It is true that the heirs of the body of *Thomas Chapman*, female as well as male, cannot take the land, being gavelkind, by descent as tenants in common, they must take as coparceners. Assuming, however, that the heirs of the body cannot take in this particular mode prescribed by the testator, it does not

(a) *Hargreave's* observations on the rule in *Chilley's* case, and *Jones v. Morgan*, 1 *Brown's Chan. Cases*, 206.

therefore

therefore follow that he did not intend that heirs of the body should take. The words of modification are to be rejected. *Doe v. Laming* is distinguishable from the present case, because there words of limitation in fee were grafted on the words *heirs of the body*, and they could not have been satisfied by an estate tail in the ancestor. If in this case the heirs of the body were to take an estate in fee, that would defeat all the limitations over. In the case stated for the opinion of the Court upon the former occasion, all the limitations over were not stated. I am of opinion that the legal effect of the devise to *Thomas Chapman* for life, and after his decease, to the heirs of his body, was to give him an estate in tail general. I think also that there are not in the subsequent part of the will any words which clearly and unequivocally shew that the testator meant that he should take an estate for life. That being so, I am of opinion that *Thomas Chapman* took an estate in tail general, and, consequently, there must be judgment for the defendant.

HOLROYD J. I think that the words "heirs of the body" must be construed as words of limitation, and that *Thomas Chapman* took an estate in tail. The decision of the House of Lords in the case of *Doe v. Jesson*, and the principles established by that case, compel us to decide that *Thomas Chapman* took such an estate. It appeared to me when this will came before the Court upon the former occasion, that the effect of the words "all my real estate," was to pass a fee to the children of the body of *Thomas Chapman*. But I am now satisfied from the subsequent limitations over, that those words were not sufficient to pass a fee to the children. If, therefore, we decided that *Thomas Chapman* did not take an estate tail, the children would take estates for life

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life only, and the estate would go over while there were members of *Thomas Chapman's* family existing, which would be contrary to the express intention of the testator. Then if the children neither take estates for life, nor estates in fee, it follows that in order to effectuate the intention of the testator, which was, that his estate should remain in the family of *Thomas Chapman*, we must hold that he took an estate tail. Besides, I think this case must be decided according to the principles laid down in *Jesson v. Wright*. Now that case establishes, that if there be a devise to *A.* for life, and after his decease to the heirs of his body, share and share alike as tenants in common, *A.* takes an estate tail. Upon the authority of that case, therefore, I am of opinion that *Thomas Chapman* took an estate tail.

LITLEDALE J. The principles applicable to this subject must be considered as finally settled by the decision of the House of Lords in *Jesson v. Wright*. The words of the will in that case were in terms very similar to the present. And it was held that the words "*as tenants in common*" might be rejected, and if so they may be equally rejected in this case. In that case the power of appointment to *W. Wright*, was very strong to shew, that it was intended that his children should take as purchasers; but there being no appointment, the House of Lords held that they took by descent. The case of *Doe v. Laming* has been relied upon for the lessors of the plaintiff, to shew that females cannot inherit gavelkind lands. They may, however, take them by way of representation. The introduction of the other terms into this will are not sufficient to do away the legal effect of the general words "heirs of the body." When this will came before this Court on a former occasion, it was held, that under
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the devise of all the testator's real estate, the children of *T. Chapman* took the fee. But the testator has disposed of the whole fee, for in default of issue, it is to go to his own right heirs. That satisfies the meaning of the word estate; it need not go to one class of individuals. Besides, if the children of the devisee for life took the fee, the limitations over would be defeated.

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Judgment for the defendant.

PLUMMER *against* WOODBURNE.

INDEBITATUS assumpsit. The first eight counts of the declaration were upon promises made to plaintiff himself, and to *Thomas Plummer, Thomas William Plummer, and John Foster Barham*, all since deceased.

Declaration in assumpsit containing several counts. Plea, non assumpsit infra sex annos. Replication as to the first ten

counts, that before and at the time of making of the said *several* promises defendant was in parts beyond the seas, and afterwards returned to this kingdom, which was the first return after his making the said *several* promises, and within six years next after such return the plaintiff sued out a bill of *Middlesex*, returnable on *Friday* next after eight days of *Saint Hilary*, to answer the plaintiff of a plea of trespass, to which the sheriff returned non est inventus. The replication then stated various writs continuing the process, but did not describe them as alias and pluries writs, and the last had an ac etiam clause. The replication then stated that the first-mentioned precept was sued out by the plaintiff with intent to implead and declare against the defendant for the several causes of action in the declaration mentioned, and accordingly the plaintiff did exhibit his bill. There was a special demurrer, and one of the causes assigned was that it did not appear that the plaintiff had not returned to this kingdom after the making of the said promises and undertakings in the first eight counts, and more than six years before the suing out of the first-mentioned precept. Semble, that it did sufficiently appear that the defendant's return was the first after each of the promises mentioned in the first ten counts. But held, at all events, that the want of the words "*each and every of them*" was not assigned with sufficient distinctness as a cause of demurrer. Held also, that the ac etiam writ was a good continuance of common process, and that the continuances need not be by alias and pluries writs.

Another plea stated that the plaintiff had impleaded the defendant in a plea of trespass on the case upon promises in a court of judicature in the island of *Saint Christopher*, for the same causes of action as those mentioned in the declaration, that the defendant pleaded non assumpsit, upon which issue was joined and the jury found for the defendants with one penny costs, that judgment was given for the defendant upon that verdict, and that that judgment was afterwards affirmed, first by a court of error in the island, and afterwards by the king in council. Held, that this plea was bad, inasmuch as it did not appear that the judgment at *Saint Christopher*'s was final and conclusive in the colony itself, so as to bar the plaintiff from another action there.

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The third count was for del credere commission, guaranteeing the solvency of underwriters, and the seventh was for interest. The ninth and tenth counts were for interest due to, and upon an account with the plaintiff, and *T. W. Plummer*, and *J. F. Barham*, after the death of *T. Plummer*. The eleventh and twelfth counts were upon similar causes of action accruing to the plaintiff and *J. F. Barham*, after the death of *T. W. Plummer*. And the thirteenth and last counts were upon similar causes of action accruing to the plaintiff alone, as surviving partner. Plea, non-assumpsit infra sex annos. And 4thly, As to the first, second, fourth, sixth, and eighth counts (omitting the third, and seventh), that plaintiff ought not to be admitted to say, that the defendant undertook and promised as in those counts, or any of them mentioned, because plaintiff and his three late copartners on the 27th *February* 1817, in a certain court of judicature of our Sovereign Lord the King, holden in parts beyond the seas, in and for the island of *St. Christopher*, to wit, a certain court of record, called the Court of K. B. and C. P., before *John Garrett*, Chief Justice, &c., at &c., impleaded the said defendant in a certain plea of trespass on the case upon promises, and in that suit declared against the defendant amongst other things, for that whereas.—(The plea here set out the declaration in the former action verbatim, which appeared to be for the same causes of action mentioned in the first, second, fourth, fifth, sixth, and eighth counts of the present declaration;) that to such former declaration the defendant pleaded non assumpsit, upon which issue was joined. And such further proceedings were thereupon had in the said former suit, that afterwards, to wit, at, &c. the said issue joined was tried by a jury of twelve men, and as to that issue the jurors of that jury upon

upon their oath did say, *that they found for the defendant with one penny costs.* The plea then stated that judgment was given for the defendant upon and agreeably to the said verdict, and that that judgment was affirmed by a court of error in the island, and by the king in council, which said several judgments are still in full force as by the record, &c. Averment that the said proceedings so had in the courts of the said island, and in the said court of privy council, were at the times when they were so had, within the jurisdiction of the same courts respectively, and were carried on in conformity with and according to the due course of law at those times established, and in force in the island aforesaid. And that the said several sums and debts in the first eight counts respectively mentioned were and are parcels of the said several sums of money, and of the said supposed debts mentioned in those parts of the declaration in the said former suit, &c., and that the defendant did not promise or undertake in respect of the said sums or debts in the first eight counts mentioned, or any of them, or any part thereof; otherwise than was alleged in those parts of the declaration, in the said former suit, which are herein above set forth. And this, &c. wherefore, &c.—The defendant pleaded fifthly, a similar plea, to the third count of the present declaration. Sixthly, a similar plea to the seventh, ninth, eleventh, and thirteenth counts of the present declaration, and, seventhly and lastly, he pleaded a similar plea to the first six, and the eighth counts of the declaration, but beginning and concluding with *actio non* instead of beginning or concluding by way of estoppel. To the second plea, as far as related to the first ten counts of the declaration, the plaintiff replied, that before and at the time of the making of the said several promises in those counts mentioned, the defendant

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ant was in parts beyond the seas, to wit, in the island of *St. Christopher*, in the *West Indies*; and the defendant afterwards, to wit, on the first of *January* 1820, returned to this kingdom, to wit, at, &c., which return of defendant was his first return into this kingdom after the making of the said *several* promises in those counts mentioned, and within six years next after the return of the said defendant into this kingdom, to wit, on the 24th day of *January* 1820, &c., the plaintiff, together with the said *John Foster*, since deceased, for the purpose of recovering the damages sustained by reason of the not performing the said *several* promises in those counts mentioned, sued and prosecuted out of the Court of *K. B.* against the said defendant a bill of *Middlesex*, returnable on *Friday next after eight days of St. Hilary*, to answer the said plaintiff and the said *John Foster*, in a plea of trespass. The replication thereon set out various writs alleged to have been granted to him *in the form aforesaid*, continuing the process from time to time; and the last writ had an *ac etiam* clause. The death of *Foster*, the co-plaintiff, was also stated. Averment that the first-mentioned precept was so sued out and prosecuted by the plaintiff and *John Foster*, *with intent to implead the defendant upon and for the said several causes of action* in the said first ten counts mentioned, and to cause the defendant to appear in the court here; and, upon his appearance, to declare against him for the several causes of action in those counts mentioned; and that, according to the said intent, plaintiff afterwards, to wit, in this same *Michaelmas* term, exhibited his said bill, and declared thereon against the defendant, to wit, at, &c., and this, &c. Wherefore, &c. — To the fourth and subsequent pleas the plaintiff replied specially that the only evidence submitted

mitted to the *St. Kitt's* jury were two affidavits setting forth the plaintiff's cause of action, and verified pursuant to the statute 5 *Geo. 2. c. 7.*; that the verdict ought to have been found for the plaintiff, and that no proceeding in the nature of a writ of attain lies upon judgments so given in the colonial courts, either in such courts or elsewhere.

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To the replication to the third plea the defendant demurred, assigning for cause, "that the said last-mentioned precept or writ, requiring the defendant to answer in a plea of trespass, and *also to a bill to be exhibited for 3100*l.* upon promises*, did not well and sufficiently continue the process in the replication previously set forth, by which the defendant is required to answer in a plea of *trespass* only; and also the process in the replication set forth does not appear to have been continued by alias and pluries precepts, or writs, according to the course and practice of the Court here; and also that it does not appear by the replication that the plaintiff had not returned to this kingdom after the making of the said promises and undertakings in the said first eight counts mentioned, and more than six years before the suing out of the first-mentioned precept, &c."

Manning for the plaintiff began. The first question is, whether a common bill of *Middlesex* in trespass will connect with a subsequent bailable writ containing an *ac etiam* clause in assumpsit, so as to avoid the statute of limitations. The object of the *ac etiam* clause is merely to comply with the statute 13 *Car. 2. st. 2. c. 2.*, which provided that no person arrested upon any bailable process wherein the true cause of action was not particularly expressed, should be compelled to give security for his appearance in any sum exceeding 40*l.*

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This clause does not vary or affect the character of the process itself. If it altered the nature of the process so as to amount to a discontinuance of the first writ, the consequence would be that a plaintiff who has sued out process merely to avoid a future plea of the statute of limitations, and who (having that object only in view) has not thought fit to proceed in the first instance by arrest, would be unable, when he came to follow up his suit after the expiration of the six years, to hold the defendant to bail for any larger sum than 40*l.*, which, if the debt were of considerably greater amount, would be attended with great injustice and inconvenience, *Leadbetter v. Markland.* (a) The *ac etiam* clause is analogous to the notice to appear in an action of assumpsit, &c., which is directed by 12 Geo. 1, c. 29., to be written under the copy of process served; and if the *ac etiam* clause is to be considered as any thing more than a statement of the real object of the process, as distinguished from its form, there will be an irregularity in joining trespass and assumpsit. Upon the second point, the *sicut alias* and the *sicut pluries* form no part of the writ, and, therefore, need not be set out in the replication. These clauses consist merely of a short recital of the fact of previous process having issued; whereas on this record the issuing of such previous process is already directly and fully stated. From the books of entries it appears that two modes of setting out consecutive writs have been adopted. In *James v. Englefield, Bart.* (b), to a plea of the statute of limitations, drawn by Lord Raymond, the plaintiff replied, a latitat issued, and that upon the non-appearance of the defendant he prayed further process, "which was

(a) 2 Blac. 1151.

(b) 1 Ld. Ent. 30.

granted

granted to him in form aforesaid." But the next process is not in any other way designated as an alias, and the defendant rejoined non assumpsit infra sex annos ante emanationem brevis. So that there Lord *Raymond* accepted such a replication as the present as good. But where the prayer of further process, and the award "that it is granted to him in form aforesaid," are omitted, the sicut-alias and sicut-pluries are stated in the replication. [*Liber Placitandi* or *Thompson Ent.* 81. *Lill. Ent.* 104 and 122.]

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Stephen contra. The replication is defective. It is pleaded in reply to the second plea, "so far as relates to the first ten counts;" and it alleges, "that before the making of the promises in the first ten counts the defendant was abroad, and afterwards returned on the first of *January* 1820 to this kingdom, which was his first return after the making the promises in the first ten counts mentioned," (without adding, or any of them, or words equivalent,) "and that within six years after such return the plaintiff sued out the first bill of *Middlesex*." Now every word of this may be true, without affording any sufficient answer in point of law; for the first eight promises are laid in 1812, and the two following in 1818. It is, therefore, possible, consistently with this record, that the defendant, after the making of the first eight promises, returned to *England*, then went back again to *St. Christopher's*, and, after making the ninth and tenth promises there, returned a second time to *England* on the first of *January* 1820. The 4 *Ann*, c. 16. s. 19. provides, by way of exception to the statute of limitations, that if any person against whom there is any cause of action shall be beyond the seas at the time that it accrues, the action may be brought

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against him within six years after his return. Where there are several causes of action, therefore, *each* must be shewn to have been proceeded upon by suit within the required period. The precedents in such cases, after alleging that the return pleaded was the first return after the causes of action first accrued, invariably add, "or any of them," or by some other form of expression shew that there was no return previous to that alleged, and subsequent to some of the causes of action. 1 *Went.* 327. 3 *Went.* 205.

Secondly, the replication is bad in substance. A bailable writ with an *ac etiam* clause is no sufficient continuance of a bill of *Middlesex* not bailable. The bailable writ here pleaded is, consequently, to be taken as the commencement of a *new* suit, and if so that suit was not commenced within six years after the defendant's return to *England*. The averment that the plaintiff sued out the first bill of *Middlesex*, with intent to declare as he has done, will not help him, if that precept will not in its nature connect with the subsequent bailable process, so as to form one continued suit. The identity of the suit first commenced with that in which the plaintiff has declared is the basis of the replication, and the continuance of the process is essential to the identity of the suit. *Smith v. Bower* (a) *Stratton v. Savignac* (b), *Kinsey v. Heyward* (c), *Leadbeter v. Markland* (d), and other similar cases, are inapplicable, for they only tend to shew that where the writs are sufficiently continued, and the suit the same, mere want of form or irregularity in parts of the process will not prevent it from operating in avoidance of the statute; but here the suit first commenced is different from that

(a) 3 *T. R.* 662.(c) *Ld. Ray.* 432.(b) 3 *B. & P.* 330.(d) 2 *Blac.* 1131.

ultimately

ultimately prosecuted. It differs in *terms*, for the suit mentioned in the first bill of *Middlesex* is a plea of *trespass*; but the *ac etiam writ* speaks of the *plea aforesaid*, and also *a bill upon promises*. Besides an *ac etiam writ* cannot in its nature be a good continuance of common process. Its effect is different, for it implies arrest and bail, 1 *Keble*, 598. (a) Its object is different, viz. to express the true cause of action, as well as to bring the defendant into court, and it is in this respect in some degree in the nature of an original. The first process in this case is a mere precept in *trespass*, the last ought rather to be considered in *assumpsit*; for the suggestion of the *trespass* in an *ac etiam writ* is mere form, and the *ac etiam* clause is the only material part, *Barber v. Lloyd* (b), *Campbell v. Palmer*. (c) To make the last process a continuance of the first; it ought to have had a clause of *sicut pluries*. *Benson v. King*. (d) But it does not appear by the replication that it had. Indeed such a clause would have been inapplicable to the case, for it could not be truly said in the *ac etiam writ*, that the sheriff had been often commanded to enforce defendant's appearance to a bill to be exhibited upon promises. It was that writ which first commanded him to do this. [Bayley J. But he had been often commanded to enforce his appearance to the *trespass*, and is not that sufficient? or does the *sicut pluries* necessarily refer to the whole tenor of the writ in which it occurs?] If it does, then this case is one to which a clause of *sicut pluries* would be inapplicable, which is a test to try whether there is essentially a want of continuance between the first and last

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(a) It is there said that the *ac etiam* was invented by the clerks, for avoiding the statute 13 Car. 2. c. 2. "But the writ is at common law before."

(b) 2 T. R. 513.

(c) 2 Chilly, 166.

(d) 1 Tidd, 161 & 8th edit. Inst. Cler. 53. Off. Brev. 23. 2 Rich. K. B. 81. Lib. Plac. 151.

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process; for no doubt the *sicut alias* and *sicut pluries*, like other forms of entry and pleading, have their sense and significancy. It is true, there are cases in which the want of strict continuance has been disregarded. But the defect was either capable of being cured by an *ex post facto* entry, or the nature of the proceeding was such as had not admitted of a regular and strict continuance, and the plaintiff had pursued his remedy in the proper form prescribed by the practice of the court, *Beardmore v. Rattenbury* (a), *Mattinas v. Phillips* (b).

ABBOTT C. J. I am of opinion that this replication is good. It professes to answer the plea of the statute of limitations, as far as that is applicable to the first ten counts. Looking at the record, it avers that the defendant was abroad at the time of making the said several promises in those counts mentioned, and that he afterwards returned on a certain day, and that that was his first return after the making of the said several promises in those counts mentioned. It is objected, that this is not averred to have been his first return after the making of each and every of those promises, but I am by no means clear that the words may not have that effect. They may be taken distributively, and be construed to mean that it was his first return after each. But assuming that to be otherwise, the want of the words "each and every of them" is mere matter of form, and should have been specifically assigned as a cause of demurrer, and I think that is not done with sufficient distinctness in this case. Another objection is, that in the first writ there is no *ad etiam* clause, and that though there is an averment, that that

(a) 5 B. & A. 452.

(b) 2 Salk. 424.

Writ was sued out with intent to declare in this action, yet the last process is not a good continuance of the former, because they have different effects. Upon the one of them the defendant may be held to bail; upon the other, he cannot. There would be great weight in that part of the argument, if by law the plaintiff could not have declared on the first process as he has done; but as he might do so, the second process is no departure from the first, but a mere addition to it. Another objection is, that there were not alias or pluries writs; and it is said, that they could not be so; but I am of opinion, that they might be made so in part, if not in the whole. At all events, this is a mere irregularity, and not a discontinuance; it cannot, therefore, have the effect of supporting the plea of the statute of limitations.

The remaining demurrers on this record were joined in the course of the pleadings that followed upon the fourth and subsequent pleas. *Stephen* was now desired to argue in support of the pleas themselves.

Stephen. The question on those pleas is, whether if in a colonial court a verdict and judgment thereon be given for the defendant, which judgment is afterwards affirmed by the King in council, these proceedings are not a bar to another action afterwards brought in *England* for recovery of the same demand? There is no express decision on this point; *Walker v. Witter* (a) only shews that upon a colonial judgment debt lies, and that the defendant may plead nil debet, and cannot plead nul tiel record, and Lord *Kenyon's* remarks in *Galbraith v. Neville* (cited *ibid.* p. 6. note 2.) shew that it is no satisfactory authority against the *conclusiveness* of such judg-

(a) *Doug.* 1.

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ment. Besides, the judgment had not been obtained upon verdict; and a verdict is in itself an estoppel upon the same matter of fact afterwards arising between the same parties, unless it has been reversed by attain, *Co. Litt.* 227 b. But *Walker v. Witter*, at most, only decides that where the plaintiff chooses to bring an action in an *English* Court, to enforce a colonial judgment, he throws it open to examination; and it by no means follows, that when *relied upon as matter of estoppel* the judgment is examinable; *Phillips v. Hunter*. (a) The same matter which is conclusive when pleaded by way of estoppel is matter of evidence only when not so pleaded, *Vooght v. Winch*. (b) In personal actions a judgment for the defendant in a former suit bars a subsequent action for the same demand, at least, if that judgment was on the merits; and trifling differences as to the manner of claim or form of action in the two cases will not prevent the bar, if there be a substantial identity, *Ferrer's case* (c), *Robinson v. Robinson* (d), *Tothil v. Ingram* (e), *Lechmere v. Top-lady* (f), *Barwell v. Kenscy* (g), *Hitchen v. Campbell* (h), *Vooght v. Winch* (i); and this rule extends to the case where the first judgment was obtained in an inferior *English* court, 3 *Hen.* 4. 11, pl. 13. *Fielding v. Ser-ratt* (k), *Mico v. Morris* (l), *Briscoe v. Stephens* (m). The case of *Burrows v. Jemino* (n) is a direct authority to shew that judgment for the defendant in a *foreign* court is a conclusive bar to a second action for the same de-

(a) 2 *H. Bl.* 410.(b) 2 *B. & A.* 662.(c) 6 *Rep.* 7.(d) *Cro. Jac.* 14. 5 *Rep.* 33.(e) 1 *Vent.* 314.(f) 2 *Vent.* 169.(g) 3 *Lev.* 172.(h) 2 *Black.* 827.(i) 2 *B. & A.* 662.(k) *Comb.* 375.(l) 3 *Lev.* 234.(m) 2 *Bing.* 213.(n) *Str.* 733. 1 *Dickins. Rep.* 48.

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mand in this country. [Bayley J. The difficulty that I feel is, that I do not see enough in this record to satisfy me that the judgment at *St. Christopher's* was final and conclusive in the colony itself, so as to bar the plaintiff from another action there; and if it was not, it cannot, of course, operate by way of estoppel here. The pleas allege merely that the jury *found for the defendant*, and that judgment was given by the said court *for the defendant upon and agreeably to the said verdict*. This does not necessarily imply a final and conclusive decision.] The pleas in this respect pursue the form in which the colonial record itself is drawn up. That form, indeed, differs from our own: but it is the invariable mode of entry at *St. Christopher's*, where a verdict and judgment have been obtained by the defendant. The pleas shew that in an action of indebitatus assumpsit an issue of non-assumpsit was joined between the parties, and allege that as to that issue the jury found for the defendant; which is equivalent to an allegation that they found that the defendant *did not undertake or promise*. This necessarily imports a verdict on the merits; upon this, judgment follows *agreeably to the verdict*; that necessarily implies a judgment upon the merits also, and, therefore, presumably a conclusive and final judgment. Besides, it is alleged that, after affirmance of the judgment on writ of error, the cause came home on appeal, and that the judgment of the Court of Error was affirmed by His Majesty in council. After this it is surely impossible to doubt that the cause was finally and conclusively decided between the parties. [Bayley J. For any thing that appears there may be a proceeding in the nature of *nonsuit* in the practice of *St. Christopher's*, although differing in form from the practice of our courts; and the form of entry here set forth

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may be only equivalent to a nonsuit.] The form of entry is not applicable to the case where a plaintiff withdraws from court, and where, consequently, no verdict is given. It is even inconsistent with such a case, for it appears that a verdict was given. No court of justice can be supposed, without proof, to use forms of entry so unsuitable to the real meaning.

The Court were of opinion that the pleas were bad, for the reasons suggested by *Bayley J.*, and gave judgment for the plaintiff.

Judgment for plaintiff.

Manning referred to *Levell v. Hall*, *Cro. Jac.* 284., as confirmatory of the view the Court had taken of this case. It was debt upon an obligation, to which the defendant pleaded that the plaintiff brought another action upon the same bond in *London*, and that the defendant had thereto pleaded non est factum, and that the jury found that it was not his deed. The entry upon the verdict there was, that the defendant should recover damages against the plaintiff, et quod eat inde sine die, &c. But no judgment quod querens nihil capiat per breve; so there was not any judgment to bar him in another suit. Therefore the Court held, that the plea was insufficient.

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TRESPASS for breaking and entering certain closes,

part and parcel of a farm called *Forton Farm*, situate in the parish of *Long Parish*, in the county of *Southampton*, and hunting for game in, upon, and over the same closes, and treading down the grass, &c. On the first four pleas no question arose: the defendant pleaded, fifthly, that one *James Widmore*, before and at the said several times, when, &c., was seised in fee of, and in divers, to wit, fifty acres of land, situate next and adjoining to the said closes in which, &c., and that by deed dated the 17th of *February* 1786, and made between one *Sir Francis Child*, who was seised in fee of the closes in which, &c., and one *Richard Widmore*, who

Trespass for breaking and entering two closes, parcel of *Forton Farm*. Plea, that one *J. W.* before and at the time when, &c. was seised in fee of 50 acres of land next adjoining the locus in quo, and that by deed of the 17th of *February* 1786, between *F. C.* who was seised in fee of the locus in quo, and one *R. W.* who was seised in fee of the 50 acres, *F. C.*

granted to *R. W.* and his heirs and assigns, for the time being owners in fee of the 50 acres, the liberty and privilege of hunting for game with dogs in the locus in quo. The plea then justified the trespass as the servant of *J. W.* Replication, that *F. C.* did not grant the liberty and privilege as in that plea mentioned, upon which issue was joined. At the trial there was no proof of any such grant as that stated in the plea, but it appeared that by a deed of that date *R. W.*, being then seised in fee of the manor of *Middleton*, conveyed *Forton Farm* to *F. C.*, reserving all royalties; but it appeared further that from the year 1753 the gamekeepers of the lord of the manor of *Middleton* were accustomed to sport over *Forton Farm* with the knowledge of the plaintiff and his landlords the owners of *Forton Farm*; that about 14 years ago the plaintiff by desire of his landlord gave notice to the then gamekeeper of the lord of the manor not to trespass, but he afterwards continued to sport there by order of the lord, without any further interruption: Held, that upon this evidence a jury ought not to have presumed a grant.

Another plea stated that before the said time when, &c. *R. W.* was seised of the closes in which, &c., and by indenture of the 17th *February* 1786, granted unto *F. C.*, his heirs, &c. the closes in which, &c. with a reservation of all royalties. The plea then deduced a title in the said royalties, from *R. W.* to *J. W.* and then justified entering the closes as his servant. Replication, that the defendant did not enter in order to exercise the said royalties, upon which issue was joined. Held, that it lay upon the defendant upon this issue to prove, first, that he had such a royalty; and, secondly, that at the time in question he was in the due exercise of it; and semble, that that could only be done by proving a grant of a free warren from the crown.

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was seised in fee of the fifty acres of land, and whose estate therein *James Widmore* at the said times when, &c., had, the said Sir *F. Child* did grant to *R. Widmore* and his heirs and assigns, for himself and themselves, for the time being owners in fee of the said fifty acres of land, the liberty and privilege by himself and themselves, and his and their servants, of hunting for game with dogs in the said closes, at his and their free will and pleasure, as belonging and appertaining to the said last mentioned lands; and the defendant then justified the trespasses as the servant of *J. Widmore*. Sixthly, as to entering the closes and treading down and bruising a little the grass, &c., that long before the said time, when, &c.; one *R. Widmore* was seised in fee of and in the closes in which, &c., and being so seised by indenture dated the 17th February 1736, made between said *R. Widmore* of the first part, Sir *F. Child* of the second part, and *W. Guidott* and *A. Guidott* of the third part, (but which deed is since lost, &c.) the said *R. Widmore* did grant unto Sir *F. Child* and his heirs the said several closes in which, &c. (in which said closes there then was, and still is a certain river), except and always reserved unto *R. Widmore* and his heirs, all royalties and the soil of the river; that Sir *F. Child* entered into the said closes in which, &c., and was seised thereof in his demesne as of fee (subject to the exception and reservation aforesaid), and the said royalties and the soil of the river then belonging to *R. Widmore*. The defendant then deduced a title in the said royalties and the soil of the said river from *R. Widmore* to one *J. Widmore*, his heirs and assigns, and pleaded that he the defendant, as the servant of *J. Widmore*, and by his command at the said several times when, &c., entered the said several closes in which, &c.,

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to exercise the said royalties and right of soil, and justified the aforesaid trespasses in so doing. To the fifth plea the plaintiff replied, that Sir *F. Child* did not grant to *R. Widmore* the liberty and privilege as in that plea mentioned. To the sixth plea that the defendant did not at the said times, when, &c., enter into the said closes, in which, &c., to exercise *the said royalties and right of soil* in the said sixth plea mentioned; upon which replications, issues were joined. At the trial before *Abbott C. J.*, at the last Summer assizes for the county of *Southampton*, a verdict was found for the plaintiff, with forty shillings damages, subject as to the issues taken upon the fifth and sixth pleas to the opinion of this Court on the following case.

The defendant on the day mentioned in the declaration, after notice from the plaintiff not to trespass, entered the closes mentioned in the declaration, being parcel of *Forton Farm*, for the purpose of beating for and shooting game there, and did beat for game there with dogs. The defendant at that time was the gamekeeper of *J. Widmore*, Esq. (in the pleadings mentioned), duly appointed by him as lord of the manor of *Middleton*, otherwise *Long Parish*, in respect of the same manor; and at the time of committing the supposed trespasses was acting as such gamekeeper, and by the order of *Mr. Widmore*. *Forton Farm* contains about 570 acres of land, and every part thereof is situate within the compass or ambit of the said manor or reputed manor, of which manor and farm, as also of a certain messuage and lands called *Middleton Farm*, otherwise *Long Parish Farm*, adjoining to part of the lands of *Forton Farm*, one *R. Widmore*, long before and until and at the time of the conveyance to Sir *F. Child* hereinafter mentioned,

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was seised in fee simple. The said manor or reputed manor was by the name of the manor or Lordship of *Middleton*, alias *Long Parish*, together with the messuage and farm called *Middleton*, otherwise *Long Parish Farm*, and all fisheries, privileges, and *royalties* to the said manor or farm belonging, conveyed to the said *R. Widmore* in fee simple, in 1698. And the estate of *Forton Farm* was conveyed to *R. Widmore* in fee simple in 1706, by a different grantor. *R. Widmore* being seised of the several premises as aforesaid by deed dated the 17th February 1736, made between himself *Widmore* of the one part and *Sir F. Child* of the second part, granted, bargained, sold, and released to *Sir F. Child*, (in the pleadings mentioned) the tenement and farm called *Forton Farm*, together with the liberty and use of the river and water for watering certain water meadows, *except and always reserved, unto R. Widmore and his heirs, three closes* particularly named (not being the closes in question) and *also all royalties and soil of the river*, to hold the same with the fishery, and liberty of fishing in certain parts of the river unto *Sir F. Child*, and his heirs and assigns, to the use of *Sir F. Child*, his heirs and assigns, for ever. *J. Widmore* at the said time when, &c., was seised in fee of the said manor or reputed manor, and the messuage and farm called *Middleton*, otherwise *Long Parish Farm*, deriving his title thereunto from *R. Widmore*, of whom he is heir at law. *Forton Farm* has been in the occupation of the plaintiff nearly fifty years last past, as tenant under *W. Iremonger Esq.* (the present owner), and his father and grandfather respectively, all deriving their title to the same under the conveyance to *Sir F. Child*. The plaintiff has been accustomed during his tenancy to sport

sport at his pleasure, and without interruption over *Forton Farm*. The grandfather and father of *W. Iremonger* (the latter of whom died about six years ago) were not themselves accustomed to field sports, but they resided at a house, called *Wherwell House*, very near to *Forton Farm*, and during their respective lives, their friends, and also *W. Iremonger*, during his father's life-time, and since his decease up to the present time, have been accustomed to sport over *Forton Farm*, without interruption of the lord of the manor, or his gamekeeper for the time being. As far back as the year 1753 (being as far back as can be traced), there are entries in the office of the clerk of the peace for the county of *Hants*, of the appointments of gamekeepers for the manor of *Middleton*, otherwise *Long Parish*, by the lords for the time being of the said manor. And evidence on the part of the defendant was given at the trial, that for nearly fifty years last past, the gamekeepers of *J. Widmore*, and his predecessors, were accustomed to sport over *Forton Farm*, with the knowledge of the plaintiff, and his landlords, and without any interruption, until about fourteen years ago, when the plaintiff by the desire of the landlord gave a notice to the then gamekeeper of *J. Widmore*, then sporting upon the said farm, not to trespass there; but the gamekeeper on the receipt of the notice, informed the plaintiff that he sported there by the orders of his master, and he continued to sport there after the notice, without any further interruption.

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 PIERCE
 against
 NORTON

Halcombe for the plaintiff. The plaintiff is entitled to have the verdict entered for him on the issues joined on the fifth and sixth pleas. The fifth plea claims the privilege of sporting, as a grant from the party under whom
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the plaintiff derives title (being the grantee in the deed of 1736), to the grantor in the same deed, under whom the defendant justifies. But the plea restricts the reservation in the deed to the parties "as owners in fee of the said fifty acres of land" mentioned in the plea. The production of the deed of 1736, however, negatives any such reservation, and no other deed between the same parties, and of the same date, can be presumed. There is, therefore, no evidence to support this plea. The deed is not pleaded as a non-existing grant, and if it were, a grant for *servants* generally to exercise a right of sporting, and not confined to such as may be qualified as gamekeepers, being contrary to the policy and provisions of the game laws, cannot be presumed. Neither is there any evidence to support it.

The sixth plea states the reservation in the precise words of the deed of 1736; but it is substantially bad, and advantage of the defect may be taken, either upon a writ of error, or in arrest of judgment, for it is not averred that the grantor in the deed of 1736 had any royalties to reserve; neither is it an implication which necessarily arises from the fact of his having reserved them. But if so, then it is not admitted by the replication, for the rule of pleading is, that the replication only admits the truth of the plea *as pleaded*. The replication is, that "the defendant did not enter to exercise the said royalties." That proposition involves a mixed question of law and fact; of fact, that the defendant at the time when, &c., was in the exercise of a supposed right; and of law, that such right was a royalty: both which it was incumbent on the defendant to have proved. The sixth plea, does not profess to answer the hunting for game; but only the breaking
and

and entering the close. So that the defendant might, if he could, under this issue have shewn that he was exercising any other royalty than a *free warren*. [*Bayley J.* I do not understand that the defendant claims a *free warren*, he must have pleaded that by grant.] The defendant rests his claim upon the word "royalties" contained in the deed of 1736, and there is no other royalty but a *free warren* which can give him an exclusive right of sporting. Upon this issue, it lies upon the defendant to shew that he had a *free warren*; but the whole evidence is opposed to such a claim, for a *free warren* is an *exclusive* right to kill game within the warren (a), and the evidence here is, that the right has been jointly exercised by those under whom the plaintiff and defendant respectively derive their interests. In the deed of 1736, by which the locus in quo was conveyed to the ancestor of Mr. *Widmore*, under whom the defendant justifies, there is no conveyance of a *free warren*; this is conclusive, therefore, against the claim, for a *free warren* is a distinct estate of inheritance collateral to the land, and will not pass without express words of conveyance.

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 NOYSE.

The Court called upon *Carter* to support his pleas.

Carter for the defendant. Upon the replication to the sixth plea it must be taken that the grantor mentioned in the deed of 1736 had the royalties which he professes by that deed to reserve. That is the necessary effect of the replication, and if the plaintiff did

(a) 2 *Blac. Com.* 38. 417. *Com. Dig. Chass (D) Warren.* 2 *Roll. Abr.* 812. *Manwood, (Warren)* 362.

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not intend to admit that fact, he ought to have demurred to the plea. [*Bayley J.* We are of opinion that upon the issue taken upon this replication it was incumbent on the defendant to prove two things; first, that he had such a royalty, and, secondly, that at the time in question he was in the due exercise of it. But this is not the usual or proper way to plead a right of free warren, nor is there any evidence to prove it. The defendant ought to have produced his grant, which is matter of record, or, at least, shewn that due search had been made for it in the proper offices where it was likely to have been found, and among Mr. *Widmore's* title-deeds. Such a right must be very strictly proved.] Taking issue upon the motive is an improper replication, and admits the existence of the royalty as reserved by the deed of 1736. A free warren is not necessarily an *exclusive* right, but may be exercised by others, conjointly with the owner of the soil, as in *Davies's case* (a), where a prescription for the lord of the manor, his tenants and farmers, to fowl in the warren of another, was held good, upon demurrer.

The deed pleaded by the fifth plea, although without profert, or an excuse for it, may be presumed, as any other non-existing grant. [*Bayley J.* But it is pleaded with a date, and not as a non-existing grant. There is a deed of the same date produced, which differs from that stated in the fifth plea; and can any other of the same date, and between the same parties, be presumed?] The evidence is, that for a great length of time the right of sporting over the estate in question has been claimed and exercised by those under whom the defendant jus-

(a) 3 Mod. 246.

tifies, without interruption from the plaintiff or his landlord, and notwithstanding a notice not to trespass given by the plaintiff to a former gamekeeper, about fourteen years ago. It was competent, therefore, to presume the deed pleaded by the fifth plea.

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Halcomb in reply. The usage proved has all been within the period of the plaintiff's tenancy of the estate, and the landlord's acquiescence cannot be inferred. There is no injury to the reversion, and the landlord could not have brought an action for any trespass in sporting over the land, because in his action he must aver and prove that the reversion has been injured (a), *Jackson v. Pesked*. (b) He will not, therefore, be bound by any usage of this description during the tenant's occupancy, which, for any thing that appears, the tenant may have authorised, and the reversioners had no power to prevent, *Daniel v. North* (c), *Wood v. Veal*. (d) The plaintiff has no estate of inheritance in the land, and, therefore, if the defendant would have availed himself of the plaintiff's acquiescence for so long a period of time, he should have pleaded his right not as a grant, by which the inheritance is to be affected, but as commensurate only with the particular estate of the plaintiff. (e)

BAYLEY J. For the reasons already stated, we think that the verdict on the issue joined on the replication to the sixth plea must be entered for the plaintiff. As to

(a) 1 *Saund.* 392. b. (u. 5.)(b) 1 *M. & S.* 234.(c) 11 *East*, 372.(d) 5 *B. & A.* 454.(e) 2 *Saund.* 175. d. (u.)

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the issue joined on the replication to the fifth plea, it has been very properly left to us to consider whether the grant pleaded by that plea might not have been presumed; and it has been urged that the fact of the defendant having continued to sport after the plaintiff's notice served upon him, fourteen years ago, without any further interruption, was some sort of proof in support of his alleged right. But we are of opinion that, upon such evidence, a jury ought not to have presumed a grant. We all know that a very mistaken notion long prevailed that the lord of a manor had a right to go not only over his own lands, but over the lands of others within his manor; and it seems probable that such was the case in the present instance; or it may have been that the ancestors of Col. *Iremonger*, who were not themselves accustomed to field sports, gave permission to the lord of the manor, as their immediate neighbour, to sport upon their estate, not *exclusively*, but jointly with their own friends and tenants; and the going over land for the purposes of sporting is certainly not an injury to the reversion. The verdict on that issue also must therefore be entered for the Plaintiff.

Judgment for the Plaintiff.

C A S E S

ARGUED AND DETERMINED

1825.

IN THE

Court of KING's BENCH,

IN

Michaelmas Term,

In the Sixth Year of the Reign of GEORGE IV.

CLERK *against* The MAYOR, BAILIFFS, and BURGESSES of BERWICK, and J. SAUNDERSON.

Monday,
Nov. 7.

A RULE had been obtained by *Ingham*, calling upon the plaintiff to shew cause why the master should not be directed to tax the defendants their costs upon a judgment of non-pros. It appeared upon the affidavits that in 1821 the plaintiff's goods were distrained for rent by the defendants. On the 19th of *January*, in that year, the plaintiff replevied, and gave a bond in the usual form, conditioned to appear and prosecute his suit with effect in the Court of Pleas at *Berwick*. At a Court holden on the 23d of *January*, he entered an action of replevin, and at another Court, holden on the 6th of *February*, he filed his plaint against the defendants before the said mayor and bailiffs, the judges of the

Where a defendant removes a cause from an inferior court by certiorari, the plaintiff is not bound to follow the suit, and the defendant cannot sign judgment of non-pros for want of a declaration.

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against
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of BERWICK.

said Court of Pleas, they being also integral parts of the corporation of *Berwick*, and, therefore, defendants in the suit. For this reason they removed the suit by certiorari, returnable in one month after *Easter* 1821; and notice of that writ was given to the plaintiff. A rule to declare in this Court was afterwards served, but the plaintiff did not obey it; wherefore defendants signed judgment of non-pros. The master, thinking they were not entitled to costs, refused to tax them.

Alderson shewed cause. This question turns upon the distinction between a removal by recordari *facias*, and by certiorari. Where the former mode is adopted, a day is given to each party to appear in the Court above; and on that ground it was held in *Davies v. James* (a), that the defendant was entitled to costs upon a judgment of non-pros. But where the removal is by certiorari or habeas corpus, no day is fixed, and the plaintiff is not bound to follow the suit, *Clack v. Dixon*. (b)

Ingham contra. The case of *Davies v. James* certainly shews that a plaintiff in an inferior Court is not bound to follow the defendant when he removes the cause by habeas corpus. But there is a great difference between a removal by habeas corpus and by certiorari. In the former no day is mentioned for the return, which there always is in a writ of certiorari. In *Watson v. Eagle* (c), where the suit had been removed by certiorari, *Hullock* serjeant, in moving to set aside a judgment of non-pros, admitted this distinction between the two modes of re-

(a) 1 T. R. 371.

(b) 3 M. & S. 93.

(c) 4 B. M. 190.

moval,

moval, and rested his case entirely upon the ground that the judgment had been signed too soon; and the Court upon that ground set aside the judgment. There is another distinction between the effect of a writ of habeas corpus and certiorari; the one brings up the record itself, the other the copy only. What fell from *Buller J.* in *Davies v. James*, respecting a removal by habeas corpus, is, therefore, inapplicable to this case.

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of BERWICK.

Per Curiam. Upon the distinction taken by *Buller J.* in *Davies v. James*, it appears that this non-pros was irregular; and, consequently, the defendants are not entitled to their costs. The language of the writ of recordari is, that the sheriff have the record before the justices at *Westminster* on such a day, "and prefix the same day to the parties, that they be then there to proceed in that plea, as it shall be just." (a) The writ of certiorari contains no direction of that kind, but merely requires that the record and process shall be returned. (b) Now where a day is not given to the party, the Court cannot pronounce judgment against him for not appearing. This rule must, therefore, be discharged.

Rule discharged.

(a) *Fitts. Nat. Brev.* 162.

(b) *Ib.* 548.

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Tuesday,
Nov. 8.LATIMER *against* BATSON.

The goods of *A.* were seized under a *fi. fa.* and the judgment creditor took a bill of sale from the sheriff and afterwards sold the goods to *B.*, who put a man into possession, but the goods remained in *A.*'s house, and were used by him as before the execution. The circumstance of the execution was, however, notorious in the neighbourhood. Another judgment creditor issued a *fi. fa.* against *A.*; under which the sheriff seized these goods. In trespass against him by *B.* held that the jury were properly directed to give a verdict for the plaintiff or the defendant, as they should be of opinion that the purchase by *B.* was *bonâ fide* or otherwise, for that if the goods were *bonâ fide* bought and paid for with his money, the sale was not rendered void by the debtor's continuing to enjoy the use of the property.

TRESPASS against the defendant, late sheriff of *Oxfordshire*, for seizing and taking away certain goods of the plaintiff. Plea, the general issue. At the trial before *Garrow B.*, at the last *Oxford* assizes, it appeared that in 1823, one *Richardson*, who had obtained a judgment against the Duke of *Marlborough*, issued a *fieri facias* thereon, under which property of various descriptions, household furniture, wine, and farming stock, was seized at *Blenheim*. An officer remained in possession by virtue of this writ, until the end of 1823, then *Richardson* took a bill of sale from the sheriff, but his Grace prevailed upon *Richardson* to postpone the sale still further. In *May* 1824, the present plaintiff took from *Richardson*, a bill of sale of the goods mentioned in the declaration, and paid him for them the sum of 700*l.*, and put a man servant into possession. On the 14th of *March* 1825, a warrant was given by the sheriff of *Oxfordshire* to his bailiff, to levy on the goods of the Duke 8639*l.*, for another judgment creditor. The plaintiffs' servant was still in possession of the goods, but the officer seized and carried them away under the second execution. Up to that time the Duke had continued to reside at *Blenheim*, and to use the goods as if no execution had been put in; but the execution by *Richardson* was well known at *Woodstock*, and generally in the neighbourhood of *Blenheim*. The learned judge told the jury, that if they thought the sale by *Richardson*

to the plaintiff was a *bonâ fide* sale, and that the purchase money was really paid by the latter, he was entitled to a verdict; but that if they thought the purchase money was in reality paid by the Duke, and the sale to the plaintiff was colorable, they should find for the defendant. The jury having found a verdict for the plaintiff,

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 against
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Jervis now moved for a new trial, on the ground that the learned Judge ought to have directed the jury to find for the defendant, if they thought either that the sale to the plaintiff was colorable, or that the Duke remained in possession of the goods; the sale in that case being void by the 13 *Eliz. c. 5*. And he cited and relied on *Wordall v. Smith (a)*, where Lord *Ellenborough* said, "To defeat the execution by a bill of sale there must appear to have been a *bonâ fide* substantial change of possession. It is a mere mockery to put in another person to take possession jointly with the former owners of the goods. A concurrent possession with the assignor is colorable. There must be an exclusive possession under the assignment, or it is fraudulent and void as against creditors."

ABBOTT C. J. I am of opinion that this case was left in a proper manner to the consideration of the jury. The facts are very different from those which existed in the case of *Wordall v. Smith*. The observations there made by Lord *Ellenborough* are very strong and very much to the purpose; but if we construe them with reference to that case, they do not warrant us in saying that the learned Judge in the present cause should have left any

(a) 1 *Campb.* 332.

distinct

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distinct question to the jury as to the possession of the goods. There an assignment was made to a creditor without any execution, or any notice to the world, that the assignor was a failing man; and the goods assigned were the furniture and stock in trade of a public house, where the business continued, after the assignment, to be carried on in the same manner as before. Here the assignment was made to *Richardson*, under the authority of the sheriff, after he had entered to execute a writ of fieri facias, and *Richardson* for a valuable consideration sold the goods now in question to *Latimer*, who suffered the Duke to continue to use them. I perfectly agree, that possession is to be much regarded; but, that is with a view to ascertain the good or bad faith of the transaction. And as it must be taken to have been proved, that the transaction between *Richardson* and *Latimer* was *bonâ fide*, that *Richardson* was paid for the goods with the money of *Latimer*, and that it was generally known in the neighbourhood of *Blenheim* that an execution had been put into the house, I think the learned Judge was perfectly correct in leaving the whole question to the jury as one of good or bad faith; and that he would not have been justified in telling them that the sale was void in consequence of his Grace the Duke of *Marlborough* having been suffered to enjoy the use of the goods.

BAYLEY J. It appears in this case that the sheriff having seized the goods in question under a fieri facias, at the suit of *Richardson*, the latter took a bill of sale of them, and afterwards for a valuable consideration sold his interest to the plaintiff, and the circumstances attending the execution were known in the neighbourhood.

Now, in *Leonard v. Baker* (a), *Watkins v. Birch* (b), and *Jezeeph v. Ingram* (c), it was held, that if goods seized under an execution are *bonâ fide* sold, and the buyer suffers the debtor to continue in possession of the goods, still they are protected against subsequent executions, if the circumstances under which he has the possession are known in the neighbourhood. The jury in this case were, therefore, properly directed to give their verdict for the plaintiff or defendant, according as they should be of opinion, that the transaction was fair or fraudulent.

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HOLROYD and LITLEDALE Js. concurred.

Rule refused.

(a) 1 M. & S. 251.

(b) 4 Taunt., 823.

(c) 8 Taunt. 838.

SELLERS *against* TILL.

Friday,
Nov. 11.

CASE for slander. The declaration stated, "That plaintiff, at the time of speaking the words, was and still is, treasurer to and collector, for certain persons, of certain tolls and rates, to wit, of certain tolls and rates arising out of and in respect of certain lands and premises, to wit, at, &c;" and that the defendant falsely and maliciously spoke and published of and concerning the plaintiff, as such *treasurer and collector* as aforesaid, the words following; that is to say, "You are an old rogue, a dead robber, and a swindler; for you are &c." Held, that the plaintiff was bound by the innuendo to prove that he was treasurer and collector.

Case for slander. Declaration stated that plaintiff was treasurer and collector of certain tolls, and that defendant spoke of and concerning the plaintiff as such treasurer and collector, certain words "thereby meaning that the plaintiff as such treasurer and collector had been guilty of,

gathering

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against
TOLL.

gathering the toll for your own pocket. You are a swindler and a thief, for you are robbing the people;" thereby then and there meaning that the plaintiff, so being *such collector and treasurer* as aforesaid, was guilty of collecting tolls for the purpose of improperly applying them to his own use. There were several counts, but in each of them there was an averment that the words were spoken of and concerning the plaintiff as *collector*, and an innuendo applying the words to the plaintiff as *collector*. Plea, not guilty. At the trial before Burrough J., at the last assizes for Stafford, the plaintiff proved that he was treasurer, but failed in making out his appointment to be collector of the tolls mentioned in the declaration. The learned Judge considered the variance fatal, and nonsuited the plaintiff.

Campbell now moved for a new trial, and contended that the words were actionable, if spoken of the plaintiff in his character of treasurer, and that, consequently, it was unnecessary to prove the residue of the inducement, viz. that he was also collector of the tolls; and he cited *May v. Brown* (a), and *Lewis v. Walter*. (b)

Per Curiam. The words complained of in this case appear to be applicable to the defendant in his character of collector, rather than in that of treasurer. It is, therefore, very doubtful whether the plaintiff could have recovered, had he alleged merely that they were spoken of him as treasurer. But in addition to this difficulty, it appears that there is, in every count, an innuendo, expressly applying the words to the plaintiff in his cha-

(a) 3 B. & C. 115.

(b) *Ib.* 138.

racter of *collector*, which makes the case very distinguishable from those which have been cited; for in them the meaning of the words was not limited by the insertion of such an innuendo. The plaintiff was bound to prove that the words were applicable to him in the manner that he had himself pointed out, and, for want of such proof, was properly nonsuited.

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against
TILL.

Rule refused.

SHELDON against WHITTAKER and Another.

Friday,
Nov. 11.

CASE upon the 8 *Ann. c. 14.*, against the defendants sheriff of *Middlesex*, for removing goods seized under a *fieri facias*, without paying a year's rent then due to the plaintiff as landlord. Plea, the general issue. The declaration alleged that the seizure was by virtue of a writ issuing out of K. B., but at the trial before *Abbott C. J.*, at the *Westminster* sittings after *Trinity* term, the writ when produced in evidence, appeared to have issued out of C. P. The Lord Chief Justice thought the variance fatal, and nonsuited the plaintiff.

Where in case against a sheriff, for removing goods seized under a *fi. fa.* without satisfying the landlord the rent due to him, the declaration alleged that the *fi. fa.* issued out of K. B. and the writ produced in evidence appeared to have issued out of C. P. Held, that this was a fatal variance.

Gurney now moved to set aside the nonsuit, and contended that it was immaterial whether the sheriff seized the goods by virtue of a writ out of K. B. or C. P. The ground of action is, that having seized the goods, he removed them without paying the rent. The statement of the writ was mere inducement to the action, and, consequently, the variance was not fatal, according to the modern cases, *Purcell v. M'Namara (a)* and *Stoddart v.*

(a) 9 *East*, 157.

Palmer,

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against
WHITTAKER.

Palmer (a), which shew that the old rules of pleading in such cases have been much relaxed.

ABBOTT C. J. In order to maintain an action upon the 8 *Ann. c. 14.* against a sheriff for removing goods without satisfying the rent due to the landlord, it is necessary to shew that a writ issued out of some Court, and that the sheriff seized the goods in pursuance of it. The seizure and removal of the goods under the writ is the foundation of the action, and the plaintiff is bound to prove the issuing of it according to his allegation. The variance in this case was therefore in a material point, and the nonsuit ought not to be disturbed.

Rule refused.

(a) 3 B. & C. 2.

Saturday,
Nov. 12.

The KING against Mc KAY.

Where a defendant is ousted on quo warranto, the prosecutor is entitled to the writ of mandamus for a new election, if he applies in reasonable time. If he does not the defendant is entitled to move for the writ.

THE defendant having been found guilty at the last *Hampshire* assizes, upon an information for usurping the office of bailiff of *Stockbridge*; on the 6th day of the present term,

Merewether on the part of the defendant moved for a mandamus to the corporation to proceed to the election of a new bailiff.

Carter said that he was instructed by the prosecutor to move for the writ.

Merewether

Merewether contended that the prosecutor should have applied sooner; but,

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The King
against
Mc Kay.

HOLROYD J. (a) after consulting the officers of the crown-office, held that the prosecutor was entitled to the writ, as he had not been guilty of any unreasonable delay in making the application.

Writ refused. (b)

We have been favored with the following note of a case which occurred in *Trinity* term, 1819. *Rex v. Mears*. The defendant in a quo warranto information for usurping the office of mayor of *Petersfield* disclaimed, and before judgment was signed moved for a mandamus to proceed to a new election, but *Bayley J.* said, that the prosecutor ought to have a priority of motion, and should be allowed a reasonable time to sign judgment and apply for a writ.

The prosecutor signed judgment a few days afterwards, but declined to move for the writ, which was thereupon granted to the defendant.

(a) The other Judges had not come into Court.

(b) See *Rex v. Corporation of West Leac*, 3 Burr. 1386, and *Rex v. Corporation of Wigan*, 2 Burr. 782.

1825.

Monday,
Nov. 14.

HALL *against* HOLLANDER.

Trespass for driving a carriage against the plaintiff's son and servant, whereby plaintiff was deprived of his services and was put to expence in obtaining his cure. The child was two years and a half old, and the plaintiff might have placed him in an hospital which would not have occasioned any expence, but preferred having him at home. Held, that the loss of service was the gist of the action, and that the child being incapable of performing any service by reason of his tender age, the action was not maintainable, particularly as no expence had been necessarily incurred.

Querry, whether the father might have maintained a special action for the expences, if they had been necessarily incurred?

TRESPASS for driving a carriage against the plaintiff's son and servant, whereby he was injured, and the plaintiff, for a long space of time, to wit, &c., was deprived of the service of his said son and servant, and of all the benefit which would otherwise have accrued to him from such service, and was also forced to expend a large sum of money, to wit, &c., in the cure of his said son and servant. Plea, not guilty. At the trial before *Abbott C. J.*, at the *Westminster* sittings after last *Trinity* term, the plaintiff proved that the defendant drove his carriage against the plaintiff's son, then an infant two years and a half old. The child was much injured, and at first was taken to the *Middlesex* hospital, where he might have remained without expence to his father, but he was afterwards taken home by his father, who thought he would be better there, and was taken daily to the hospital for advice for some months, at the expiration of which time he was dismissed as cured. The father also hired a servant to attend the child during his illness. Upon this evidence it was objected for the defendant that the child was not competent to perform any service by reason of his tender age, and that as loss of service was the gist of the action, the plaintiff must be nonsuited. The Lord Chief Justice was of that opinion, but offered to leave it to the jury to say, whether the child was capable of performing

services to which any value could be attached. The counsel for the plaintiff did not desire the question to be so left, and thereupon the plaintiff was nonsuited.

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HALL
against
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Laves now moved for a new trial, and contended that the plaintiff was entitled to recover without proving any actual service by the child. In this respect the case of a child differs from that of a mere hired servant. In the latter case, loss of actual service must be proved; but in the former, the child being resident with and under the control of the parent, must unavoidably be, in legal acceptance, a servant, so as to support an action of this nature, *Jones v. Brown* (a), *Fores v. Wilson* (b). At all events, the plaintiff was entitled to recover the expence which he was put to in obtaining the cure of his son.

BAYLEY J. I am of opinion that the nonsuit in this case was right. It has been contended that the action is maintainable on two grounds; first, for the loss of the services of the child, and, secondly, for the expences incurred by the father, in consequence of the injury sustained by the child. With respect to the first ground, I apprehend that the gist of the action depends upon the capacity of the child to perform acts of service. Here it is manifest that the child was incapable of performing any service. The authorities upon this point are all one way. In the cases which have been cited, the child being capable of performing acts of service, and living with the parent, would naturally be called upon to perform some acts of service; and it was, therefore,

(a) *Peake, N. P. C. 235. 1 Esp. 217. S. C.*(b) *Peake, N. P. C. 55.*

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HALL
against
HOLLANDER.

held, that service might be presumed, and that evidence of it need not be given. In *Weedon v. Timbrel* (a), both Lord *Kenyon* and *Ashurst* J. say, that the loss of service is the gist of such an action as the present, and that the plaintiff must give some proof of acts of service, in order to support the allegation in the declaration, although very slight evidence is sufficient; and in a case of *Sattherthwaite v. Duerst* (b) it was held that an action for debauching a daughter could not be maintained by a father, unless she was his servant, and that the action could not be maintained on the ground of expence having been incurred in providing for her during her confinement. In this case, too, it was proved that the father did not necessarily incur any expence; if he had done so I am not prepared to say that he could not have recovered upon a declaration describing, as the cause of action, the obligation of the father to incur that expence.

HOLROYD J. It was not established by evidence at the trial that the father was necessarily put to any expence; the Court are, therefore, not called upon to give any opinion upon his right to recover such expences. It is clear that in cases of taking away a son or daughter, except for taking a son and heir, no action lies, unless a loss of service is sustained, *Gray v. Jefferies* (c), *Barham v. Denner*. (d) The mere relationship of the parties is not sufficient to constitute a loss of service. The reasoning in all the modern cases shews that some evidence of service is necessary; none could be given in the present case, the nonsuit was, therefore, right.

(a) 5 T. R. 357.

(b) K. B. E. T. 25 G. 3. 5 East, 47. n.; see also the principal case there, *Dean v. Peel*.

(c) Cro. Eliz. 55.

(d) Ib. 770.

ABBOTT C. J. It is a principle of the common law that a master may maintain an action for a loss of service, sustained by the tortious act of another, whether the servant be a child or not; and when that foundation of the action has existed, courts of justice have allowed all the circumstances of the case to be taken into consideration, with a view to the calculation of the damages. Here we are required to go further, and to hold that the action is maintainable, although no service was or could be performed by the child, and that too upon a declaration alleging the existence of the relation of master and servant, and the loss of the services of such servant. Such a decision would not be warranted by any former case, the nonsuit, therefore, ought not to be disturbed.

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HALL
against
HOLLANDER.

Rule refused.

WINDER *against* FEARON.

Saturday,
Nov. 12th.

COVENANT on a deed of exchange. The only question made at the trial before *Hullock* B. at the last *Cumberland* assizes was, whether the deed was properly stamped within the 55 G. 3. c. 184. sched. part 1. title *Exchange*, by which if no sum of money, or only a sum under 300*l.* shall be paid, or agreed to be paid for equality of exchange, the duty is 1*l.* 15*s.*, and where any such deed of exchange, together with any schedule receipt or other matter *indorsed* thereon, or annexed thereto, shall contain 2160 words or upwards, then for every entire quantity of 1080 words contained therein,

An indorsement on a deed of exchange containing the names of the parties, the date of the execution of the deed, &c. is no part of the deed, or other matter indorsed thereon, within the meaning of the 55 G. 3. c. 184. sched. part 1. title *Exchange*, and therefore the words contained in it are

not to be reckoned as part of the 1080 words for which the further progressive duty of 1*l.* 5*s.* is imposed by that statute.

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over and above the first 1080 words, a further progressive duty of 1*l.* 5*s.* The body of the deed contained 3230 words, but there was an indorsement on it containing the names of the parties, the date of the deed, &c.; and if this indorsement constituted part of the deed, the whole would contain more than 3240 words, and in that case it ought to have been impressed with a stamp of 4*l.* 5*s.*; but if it was not part of the deed, then the stamp of 3*l.*, with which it was impressed, was sufficient. The learned Judge was of opinion that it was no part of the deed, and the plaintiff obtained a verdict.

Brougham now moved for a new trial upon the above objection taken, and cited *Cook v. Remington (a)* to shew that an indorsement is part of a deed, and that oyer must be given of it.

But the Court were clearly of opinion that the indorsement in this instance formed no part of the deed, for that it did not in any way control the operation of it, and that the stamp was therefore sufficient.

Rule refused.

(a) 6 *Mod.* 209.

GARRETT and BODENHAM, surviving Partners of
PHILLIPS *against* HANDLEY.

An action may be maintained by the several partners of a firm, upon a guaranty given to one of them, if there be evidence that it was given for the benefit of all.

ASSUMPSIT upon a guaranty. The first count of the declaration stated, that on the 12th of *February* 1818, by a certain letter written and addressed by the defendant to *John Garrett* on behalf of himself and *C. Bodenham* and *Robert Phillips*, in consideration that the plaintiffs and their deceased partner,

ner, at the request of the defendant, would advance to one *T. Gibbons* the sum of 550*l.* to enable him to discharge immediately the sum of 550*l.* for which he had become security for one other, *T. Gibbons*, the defendant promised plaintiffs and their deceased partner, that provision should be made for repaying the plaintiffs and their deceased partner the said first mentioned sum of 550*l.*, under a certain arrangement then going on for the settlement of all the concerns of the said first mentioned *T. Gibbons*. Averment that the plaintiffs and their deceased partner did immediately after making that promise, to wit, on the said 12th of *February*, advance and pay, and cause to be advanced and paid to the said first mentioned *T. Gibbons* the said sum of 550*l.* for the purposes aforesaid; and that although a reasonable time for the defendant to have caused provision to be made for the repayment of the said sum of 550*l.* had long since elapsed, and although *T. Gibbons* had not paid the same, yet the defendant had not made any provision for repaying the same under the arrangement or otherwise. Plea, first, non assumpsit. Secondly, that the causes of action did not accrue within six years. At the trial before *Burrough J.*, at the Summer assizes for the county of *Hereford*, 1825, the plaintiffs produced and proved the following letter written by the defendant, and addressed to *John Garrett*, one of the plaintiffs. "Sir, — I understand from Mr. *Gibbons*, that you had the goodness to consent to advance 550*l.* to discharge immediately a like sum for which he became security for his cousin Mr. *T. Gibbons*, upon my assurance which I hereby give, that provision shall be made for repaying you this sum under the arrangement now going on for the settlement of Mr. *Gibbons's* concerns." In consequence of the assurance given in this letter, the money was ad-

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vanced by *Bodenham* and Co, to *Gibbons*. The plaintiffs then produced a correspondence between *Bodenham* and Co. and the defendant, which took place between the 8th of *January* and the 10th of *March* 1820, for the purpose of shewing that the guaranty contained in the letter of the 12th of *January* 1818, though in terms given to *John Garrett*, one of the plaintiffs, was intended for the benefit of the firm. On the part of the defendant it was urged, first, that the correspondence did not prove that the guaranty was intended for the benefit of the firm; and, secondly, assuming that it did, still that the action ought to have been brought in the name of *John Garrett*, to whom the guaranty was in terms given. The learned Judge reserved that point, and a verdict was found for the plaintiff.

Jervis now moved to enter a nonsuit. A guaranty ought to be construed strictly; the promise was made to *John Garrett* alone, and the action ought to have been brought by him alone, and not by the plaintiffs. [*Bayley* J. May not the action be brought either in the name of the party with whom the contract was made, or of the party for whose benefit it was intended? An action on a policy of insurance may be brought in the name of either.] Secondly, the correspondence produced in evidence did not establish that the guaranty was given for the benefit of the three parties.

The case stood over, to enable the Court to peruse the correspondence, till this day.

ABBOTT C. J. We have perused the correspondence in this case, and we think it sufficiently appears that the guarantee was intended for the benefit of the firm, and

not

not of *John Garrett* alone. That being so, we are of opinion that the action was properly brought in the name of the parties for whose benefit the contract of indemnity was entered into.

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Rule refused. (a)

(a) See *Bateman v. Phillips*, 15 *East*, 272.

DOE on the Demise of J. ELLAM against
WESTLEY.

EJECTMENT for premises in the parish of *West Wrating*, in the county of *Cambridge*. At the trial before *Alexander C. B.*, at the Summer assizes for *Cambridge* 1825, it appeared that the lessor of the plaintiff was heir at law of *Joseph Ellam*, who died seised in fee of the premises in question. The defendant was heir at law of *Mary Westley*, devisee under the will of *Joseph Ellam*, which was duly executed to pass real estate. The testator first gave several pecuniary legacies, the bequest of each commencing with the word "Item," devised as follows: "Item, I give and bequeath unto *C. D.* all that my messuage and tenement wherein I now dwell, with the garden and all the appurtenances thereto belonging; and I also give to the said *C. D.* all my household goods and chattels, and implements of household, within doors and without, all for her own disposing free will and pleasure, immediately after my decease:" Held, that *C. D.* took only an estate for life in the premises devised to her,

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appurtenances thereto belonging; and I also give to the said *Mary Westley* all my household goods and chattels, and implements of household within doors and without, all for her own disposing, free will, and pleasure, immediately after my decease." *J. Ellam* and *M. Westley* were made executor and executrix of the will. A verdict was found for the plaintiff, the defendant having leave to move to enter a nonsuit, on the ground that *Mary Westley* took a fee in the premises devised to her by *J. Ellam*; and now

Storks moved accordingly. It is clear that the testator intended to give an estate in fee to *Mary Westley*, and the words of the will are sufficient for that purpose. Where he intended to give an estate for life, viz. to *John Ellam*, he provides for the disposal of the property after his decease. There is no such provision in the devise to *M. Westley*. Then the words *all for her own disposing, &c.* are sufficient to pass the fee according to numerous decisions, *Jennor and Hardie's case* (a), *Goodtitle v. Otway* (b), *Loveacres v. Blight* (c); and those words must be construed as referring to the whole which had previously been devised to *Mary Westley*, and not merely to the household goods, *Fenny v. Eustace*. (d) In that case testator devised, "First, to his wife certain property; secondly, to his two nephews, *J. and T. Collings*, certain other property; thirdly, as follows: I give unto my nephew *J. Collyer*, all that my house and premises at *Pitston*, in the occupation of *R. Read*; I also give unto my nephew *J. Collyer*, all that my land in the

(a) 1 Leon. 283.

(c) Cowp. 352.

(b) 2 Wils. 6.

(d) 4 M. & S. 58.

parishes of *Piddleston* and *Aubury*, in the occupation of *J. Tompkins*, to him, my said nephew, *his heirs and assigns for ever*." And the Court held that the words of inheritance in the last branch of this demise, enlarged the devise of the house and premises at *Pitston*, into a devise of the fee.

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Don
against
Westley.

ABBOTT C. J. I think that our safest course is to consider the two distinct sections of this will as making two distinct devises; and if that be correct, *Mary Westley* took an estate for life only in the premises in question. Such a construction could not be put upon the will in *Fenny v. Eustace*, for there the numerical arrangement of the devises shewed plainly that the testator intended to pass the fee.

BAYLEY J. In order to say that more than a life estate passed, we should require words expressing a plain intent to that effect. Now stopping after the word *garden* in the demise to *Mary Westley*, there is nothing to shew the quantum of interest that she was to take. Then the testator proceeds: "I also give," &c. It is an old observation, that the introduction of the word "Item" shews that the testator is dealing with a new subject, and that the words following apply to that only, and not to the preceding matter, unless the intention that they should do so is plain. Here the words, "all for her own disposing," may apply to both clauses, but that is not by any means clear; we are, therefore, bound to hold that they apply to the second clause only. In *Fenny v. Eustace*, *Le Blanc J.* observed, that the numerical divisions shewed, "that the testator meant to describe, first the persons and property which were the subject

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subject of his devise, and to wait until the end to point out the *estate* he devised.

HOLROYD and LITLEDALE Js. concurred.

Rule refused.

Wednesday,
Nov. 16th.

The KING *against* The Inhabitants of the
County of DEVON.

The inhabitants
of a county are
not bound to
widen a public
bridge.

INDICTMENT stated as follows: " that on the 10th day of *February*, in the 4th year of G. 4., there was, and from thence hitherto hath been, and still is, a certain common and public bridge, commonly called *Dart* bridge, lying and being in the parishes of *Buckfastleigh* and *Ashburton*, in the said county, being a common highway leading from the city of *Exeter*, unto and over the said bridge to the town of *Plymouth* in the said county, for all the subjects of the king on foot and on horseback, and with their horses, coaches, carts, and carriages upon and over the same bridge, to go, return, pass, ride, and travel at their will and pleasure, freely and safely without any obstruction, hindrance, or impediment whatsoever; and that the said common and public bridge, on the 10th day of *February* in the year aforesaid, and continually afterwards until the day of taking the inquisition at the said parishes of *Buckfastleigh* and *Ashburton* in the said county, was and yet is ruinous, broken, dangerous, and in great decay for want of needful and necessary upholding, maintaining, amending, and repairing the same, and the said common and public bridge, during all the time last mentioned, was, and yet is too narrow,

narrow, so that the subjects of the king, in, upon, and over the said bridge on foot, and with horses, coaches, carts, and carriages, could not and cannot pass and re-pass, ride and travel without great danger of their lives and the loss of their goods as they ought to do, but were, and yet are, greatly obstructed, stopped, and hindered in the going, returning and passing, riding and travelling, upon and over the same common public bridge, and during all the time aforesaid, were, and yet are, in great peril, hazard, and danger of being overturned in the said carts, coaches, and carriages, and of being killed owing to the narrowness of the same, to the great damage and common nuisance of all the subjects of the king upon and over the said bridge on foot, and with their horses, coaches, carts, and other carriages, about their necessary affairs and business, going, returning, passing, riding, and travelling, against the form of the statute in that case made and provided, and against the peace, &c.; and that the inhabitants of the county of *Devon* of right have been, and still of right are bound to repair and amend the same common bridge, so as aforesaid being broken, ruinous, too narrow, and in decay, and to make the same safe and secure for the said subjects when and so often as it becomes necessary." Plea, not guilty. The jury found a special verdict stating the following facts.

The bridge called *Dart* bridge in the indictment mentioned, on the 10th of *February* in the 4th year of *G. 4.*, was, and from thence hitherto hath been, a common and public bridge for all the liege subjects of the king on foot and on horseback, and with their horses, coaches, carts, and carriages upon and over the same bridge, to go, return, pass, ride, and travel at their free will and pleasure,

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pleasure, freely and safely without any obstruction, hindrance, or impediment whatsoever. The said common and public bridge, on the day and year last aforesaid, and continually afterwards, until the day of taking the inquisition, was not ruinous, broken, dangerous, and in great decay, for want of necessary upholding, maintaining, amending, and repairing the same. But it was on the day and year last aforesaid, and continually afterwards, until the day of taking the inquisition, and still is too narrow, so that the liege subjects of our lord the king, in, upon, and over the same bridge on foot, and with horses, coaches, carts, and carriages, could not, and cannot pass and repass, ride and travel without great danger of their lives and the loss of their goods, as they ought to do, but were, and yet are, greatly obstructed in going, returning, and passing, riding, and travelling over the same common public bridge; and during all the time aforesaid were, and yet are, in great peril, hazard, and danger of being overturned in the said carts, coaches, and carriages, and of being killed owing to the narrowness of the bridge; but the bridge, on, &c., and during all the time aforesaid, was, and still is, as wide as it ever was, and the inhabitants of the said county of *Devon* of right have been, and still of right are bound, to repair and amend the said common public bridge.

P. Williams for the crown. The question is, whether the inhabitants of a county who at common law are bound to repair a bridge are not also bound to widen it, whenever the public convenience requires that it should be made wider. It certainly never has been decided that the inhabitants of a county are bound to widen

widen an ancient bridge; but in *Rex v. The Inhabitants of Cumberland* (a), Lord *Kenyon* says, "that the Court, in a former stage of that cause, had intimated a strong opinion, that if a bridge used for carriages, though formerly adequate to the purposes intended, were not now of sufficient width to meet the public exigencies, owing to the increased width of carriages, the burden of widening it must be borne by those who are bound to repair the bridge. And upon that question there cannot be entertained much doubt." That case afterwards came before the House of Lords upon writ of error (b), when Lord *Eldon* expressed doubts upon this question, and the case was ultimately decided upon another ground. The question to be considered now is, whether the inhabitants are not bound to widen a bridge, for the same reason that they are bound to repair it. Lord *Coke*, in his comment upon the statute of bridges, in 2 *Inst.* 700. says, "That at common law individuals or corporations are bound to repair bridges, by reason of their tenure or prescription; but that if none were bound to the reparation of the bridge by the common law, the whole county, that is, the inhabitants of the county or shire wherein the bridge is, shall repair the same; for of common right the whole county must repair it, because it is for the common good and ease of the whole county. Also if a man make a bridge for the common good of all the subjects, he is not bound to repair it." And in 13 *Co.* 33. "A bridge shall be levied by the whole county, because it is a common easement for the whole county," which is taken from the 10 *Ed.* 3. 20 b. And in *Dalton's Just.* c. 16. p. 58. a stronger expression is used; "By common right bridges shall be

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(a) 6 *T. R.* 194.(b) 3 *B. & P.* 354.

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amended by the whole county, for it is for their common good and ease." It should appear, therefore, that the county was made liable against its will, and for what purpose? For the ease and benefit of the whole county. A purpose clearly entitled to receive a favourable and reasonable interpretation. The reason, therefore, why the inhabitants of a county are bound to repair a bridge, being that it is for the common benefit of the whole county; it would seem to follow, that where it is for the common benefit of a county that a bridge should be widened, the inhabitants of a county should be at the expence of widening it. The common law obligation to repair bridges may be traced to the earliest times. *Pontis reparatio, arcis constructio, expeditio contra hostem*, constituted the *trinoda necessitas*, to which all lands in Saxon times were subject. These three objects are correlative and dependent on each other, and if the *pontis reparatio* did not include a sufficient widening, the *expeditio contra hostem* might be altogether defeated. Suppose that in those times, in consequence of a bridge being too narrow, the monarch could not pass with his waggons and military stores, would it have been permitted to the persons liable to repair, to say that the bridge was fit for the species of carriage which was in use 100 years before? The answer would have been, that they were bound to keep the bridge fit for those purposes for which the public required it from time to time. That is the construction which reason, fortified by power, would put upon the obligation to repair bridges, and that construction would secure the rights of the crown, and the convenience of the community. In the confirmation of magna charta by Henry 3. c. 15. it is declared, "*Nulla villa, nec liber homo distringatur, facere pontes aut riparias nisi qui ab antiquo et de jure, facere*

facere consueverunt tempore Henrici regis avi nostri.”

At that time the obligation rested where custom or prescription had fixed it, and it was intended to prevent the monarch from ordering a new bridge to be built on a new site altogether. The term “facere” cannot well mean any thing less than repair; and the fair construction is, that no person shall be called upon to do any thing to a bridge which he was not anciently bound to do, the object of that clause being to impose a restraint on the crown. Thus the statute of bridges has always received a liberal construction, as being a statute declaratory of the common law; and although the common law rule be, that the inhabitants are liable to repair, yet still that rule ought to be liberally construed with reference to the beneficial purpose for which it was intended, and so as to lead to a fair distribution of the burden of repairing among the public. And giving it a liberal interpretation, it may be considered as throwing upon the inhabitants of the county the obligation of rendering the bridge reasonably fit for ordinary purposes. The word reparatio is equivalent to re-edificatio, and, construed liberally, is sufficient to import the widening of a bridge already built. A road which might be in perfect repair for waggons and other carriages two centuries ago, but not fit for a mail coach in the present day, would clearly be indictable. It is to be observed also in this particular case, that the bridge is alleged to be for all carriages, &c.; and that the king’s subjects cannot pass and repass in their carts and carriages; and unless it is the unreasonable doctrine of the English law, that it is never to accommodate itself to circumstances, those carriages and vehicles must be intended which are in ordinary and necessary use. As this allegation is not traversed, the fact is found by the verdict, that the King

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and his subjects cannot safely pass and repass "in carts and carriages," &c. ; and then the county is answerable for the consequences, without referring to the cause of the interruption, whether it arose through want of repair, or the narrowness of the road ; inasmuch as the bridge is not in a sufficient state for those purposes for which the obligation of the law has been imposed upon counties.

Tancred contrà, was stopped by the Court.

ABBOTT C. J. The question in this case is by no means new to the mind of the Court, for the same was raised in a case which lately came before us from the county of *Lincoln* (a), and we then expressed a very strong opinion, that a county could not be compelled to make a bridge wider than it had formerly been. The point to be considered is, what extent of charge can by law be cast upon the inhabitants of a county, and not merely the nature of the bridge which the convenience of the public requires. This case has been argued with great learning and ability, but not one single authority (with the exception of a dictum of Lord *Kenyon*) has been cited, to shew that a county may be compelled even to make an ancient bridge wider than it was before. There are many bridges in this country which were formerly wide enough for the little traffic which then existed, but which are now inconvenient and too narrow, with reference to the increased traffic, which takes place in modern times ; yet there has been no instance in which the inhabitants of a county have been compelled to accommodate the bridge to that increased traffic by

(a) *Rex v. Inhabitants of Lincoln*, in which case the defendants having been found guilty, a rule nisi for a new trial was granted in *E. T. 5 G. 4.* ; but it has not been yet disposed of.

widening

widening it, that is, by adding to the bridge something which did not exist before. And if we should lay down the law to be, that the inhabitants of a county may be compelled to widen a bridge, I am utterly unable to see why we should not be called upon to say, that the inhabitants of a parish are bound to widen a public high-road; and the inconvenience arising from such a rule is obvious. The inhabitants of a parish as such have no power, except by act of parliament, to purchase at their own expence, land for the purpose of widening a road; and if they could be compelled to buy land for such a purpose, I do not see why they should not also be compelled to buy houses, and then the inhabitants of the parish of *Saint Andrew, Holborn*, might be compelled to purchase and pull down the houses on one side of the north end of *Chancery Lane*, and so make the road wide enough for two carriages to pass, which they cannot do at present. In the absence of all authority, except the dictum of Lord *Kenyon*, I think it is not in the power of this Court to say that the inhabitants of a county or parish are liable to greater burdens than have hitherto been cast upon them, and, therefore, I think that the inhabitants of *Devonshire* are not bound to widen this bridge. If public convenience requires that it should be done, that object must be effected by a higher authority than that of this Court.

BAYLEY J. If there be any analogy between the obligation of a parish to repair a road, and that of a county to repair a bridge, the case of *The Queen v. The Inhabitants of Stretford* (a), is an authority to shew that

(a) 2 *Ld. Raym.* 1169.

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the inhabitants of a county are not liable to widen a bridge. The indictment there was, that the road was so muddy and narrow, that the queen's subjects could not pass along it without danger of their lives, and that the inhabitants had time out of mind repaired it, and ought to repair it as often as need was. After a verdict and judgment for the crown, a writ of error was brought, and the exception taken was, that the time at which the way was laid to be muddy was the 11th of *January*, which was in winter, and that it was no offence for the highways to be dirty in winter; and, secondly, that the allegation that the way was so narrow that the queen's subjects could not pass, furnished no ground for an indictment against the parish, because the parish had not by law the means of widening it, for they had no right to take adjoining land in order to widen the road; and the indictment was held bad for want of saying that the way was out of repair. And *Powell J.* said, "that the saying that it was so narrow that the queen's subjects could not pass, was repugnant to its being a king's highway, for if it had been so narrow, people could not have passed there time out of mind." When a road is originally made, it may so happen that the proprietor of the land over which the road passes, which he dedicates to the use of the public, has nothing on the one side or the other, and if the public take to it, they take to it subject to the inconveniences to which that slip of land is liable; and the parish, under such circumstances, can have no power to widen the road. The analogy, however, between a road and a bridge, is not perfect; and it does not necessarily follow, that although a parish has not the power of taking the adjoining land, a county may not have the power of widening a bridge. Independently, however, of that case, I am

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of opinion, that circumstanced as this bridge is, there is no obligation on the county to widen it. Is a county bound to make a bridge, where there was none before? There is no authority for saying that it is so bound, and the passage cited from Magna Charta shows that the inhabitants of a county are under no obligation to make a bridge; and there is no instance of an indictment against the inhabitants of a county for not making a bridge. The obligation of the inhabitants of a county to repair a bridge, arises out of the adoption of that bridge by the public, with the concurrence of the inhabitants of the county. Where a bridge is built by an individual, with high roads at each end of it, and the public use the bridge, and the inhabitants of the county suffer it to be used as a public bridge, the latter thereby incur an obligation to keep the bridge in the state in which it was when dedicated to and used by the public, but they do not thereby incur any obligation to make it different from what it then was. Now in this case it is stated, that in the fourth year of the reign of his present majesty this bridge existed. It is not stated in the special verdict, whether it was ever passable before that time or not. It is stated that the bridge is so narrow that the king's subjects cannot pass without danger of their lives and loss of goods; but the public thought fit to take to it in the state in which it was originally given to them, and having so taken to it in that state, I think that the law does not throw any obligation on the inhabitants of the county, to alter it. For these reasons I am of opinion, that as a county is not bound to make a bridge, it is not bound to widen one: Quoad the addition, that would be a making; because the addition beyond the existing width, would be pro tanto a new bridge. I am, there-

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fore, of opinion, that there must be judgment for the defendants.

LITLEDALE J. (a) I am of opinion, that by the common law a county is only bound to repair actually existing common and public bridges. If the inhabitants of a county were bound to widen a bridge merely because the public convenience required that it should be widened, it might be said, that where the public convenience requires a bridge to be made where there was none before, the inhabitants of a county would be bound to make one. For there is just as much reason to call upon them to make a new bridge where there was none before, as to widen an existing bridge. It is quite clear, that by the common law there is no obligation on the inhabitants of a county to make a bridge where there was none before; and it appears to me, therefore, that they are not compellable to widen a bridge. If the public convenience requires that bridges should be made, they must be made by the authority of the legislature; and so if it requires bridges to be enlarged, that also must be done by the same authority. If at common law the inhabitants of a county were obliged to widen a bridge, they must have had the means of doing it, and in order to widen a bridge, they must have had the means of purchasing land upon which the ends of the bridge must rest, and also to purchase the interest of persons who might have fisheries, and whose rights would be interfered with, by extending the pillars and abutments of the bridge. Now by the common law the inhabitants of a county have no right to expend the public money in purchasing the land necessary for these

(a) Holroyd J. was absent in the Bail Court.

purposes.

purposes. In some cases it might possibly become necessary in order to widen a bridge, to take down buildings at either end of a bridge, because the width at the ends must be increased. But I apprehend that by the common law the county has no right so to expend the public money, and most certainly there is no obligation on any person to sell his land or houses. Then if the county has not the means of widening a bridge, it affords a strong presumption, that they are not bound to do it. By statute 43 G. 3. c. 59. the inhabitants of a county may, for the purpose of widening a bridge, compel the sale of land, and by 54 G. 3. c. 90. of any buildings, but at common law they had no such power. Upon the whole, I am of opinion that there is no obligation at common law on a county to widen a bridge, and consequently there must in this case be judgment for the defendants.

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Devon.

Judgment for the defendants.

JAMES *against* SWIFT.

Tuesday,
November 15th.

THIS was an action of trespass and false imprisonment against the defendant, who was a magistrate of the county of *Monmouth*, for wrongfully committing the plaintiff to prison. The notice of action proved at the trial before *Garrow B.*, at the last Summer Assizes for the county of *Monmouth* 1825, was signed *T. and W. A. Williams*. The names of the plaintiff's attornies were *Thomas Adams Williams*, and *William Adams Williams*. It was objected that the notice was not sufficient, inas-

In an action for false imprisonment against a justice of the peace, the notice required by the 24 G. 2. c. 44. was signed *T. and W. A. Williams*. The names of the attornies for the plaintiffs were *Thomas Adams Williams* and *W. A. Williams*.

ham Adams Williams: Held, that the notice was sufficient.

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much as the statute 24 G. 2. c. 44. s. 1., required that on the back of the notice of action there should be indorsed the name of the attorney with the place of his abode. The learned Baron overruled the objection, and the plaintiff obtained a verdict.

Ludlow now moved for a new trial, and contended, that the true names of the plaintiff's attorneys had not been indorsed on the notice. He admitted, that in *Mayhew v. Lock* (a), it was held sufficient to indorse on the notice, the initial of the Christian name of the attorney; but here, the initial of one of the Christian names of one of the plaintiff's attorneys was omitted. The indorsement should have been "*T. A. and W. A. Williams.*"

The Court held the notice to be sufficient, and said that the statute was not to be construed with extreme rigour, and, therefore, an initial of the Christian name of the plaintiff's attorney had been properly held to be sufficient. They thought that, in this case, the word *Adams* might be connected with the two initials representing *William* and *Thomas*. And *Holroyd J.* observed, that the act of parliament did not require all the names of the attorneys to be inserted, but merely the names, and therefore it would seem that the statute did not require the Christian name of the attorney to be indorsed on the notice.

Rule refused.

(a) 7 Taunt. 68.

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The KING against The Inhabitants of
CAVERSHAM.

Wednesday,
November 16th.

UPON appeal against an order of two justices, whereby *Ann Dight*, wife of *John Dight* a prisoner under confinement at *Reading* gaol, and their seven children, were removed from the parish of *Saint Mary in Reading*, to the parish of *Caversham*, in the county of *Oxford*, the sessions confirmed the order of removal, subject to the opinion of this Court on the following case:

In the year 1817, the pauper's husband occupied a tenement in the parish of *Caversham*, of the yearly value of *9l. 19s.*, paying rent after that rate, upon which he resided three quarters of a year. During the time he so occupied this tenement he agreed, being a butcher by trade, with the collector of the tolls of *Reading* market for the occupation of one of the several stalls in the market, for which he was to pay *2s. 6d.* per week. The stall used by the pauper's husband under this agreement was like the others, a permanent building furnished with a door capable of being locked, and the key was always in his possession, but he had a right of access to the stall only on *Wednesdays* and *Saturdays*, being market days. At each extremity of the market are iron gates, which are closed and locked except on *Wednesdays* and *Saturdays*, and when locked, preclude all access to the stalls except by permission of the collector, which was occasionally granted to the pauper's husband. He continued to use the stall from the 1st of *November* 1817, to the 14th of *March* 1818, paying the *2s. 6d.* at the end

A butcher agreed to occupy a stall in a market at *2s. 6d.* per week. The stall was a permanent building, with a door capable of being locked, and the key was in his possession, but he had a right of access to the stall on two days in the week only. On other days the market was closed. The pauper used the stall on the market days, for a period of nineteen weeks, and paid rent for that time: Held, that he had occupied the stall for thirty-eight days only, and therefore gained no settlement. Semble, that this was a coming to settle upon a tenement within the statute 13 & 14 Car. 2. c. 12. s. 1.

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 ants of
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of each week or fortnight, according to convenience, and occupying at the same time the tenement in *Caversham*. The sessions confirmed the order subject to the opinion of this Court upon the question, whether the renting and occupation of the stall in the manner, and during the period aforesaid, was such a renting of a tenement for forty days, as might be coupled with the other tenement of 9*l.* 19*s.*, so as to confer a settlement in the parish of *Caversham*.

Talfourd in support of the order of sessions. There was an actual occupation of the stall by the pauper, and the stall must be considered as a tenement. It was fixed to the ground, and the pauper had the power of excluding the rest of the world from it during the whole period of his occupation. This case, therefore, bears no analogy to *Rex v. Dodderhill* (a), where the pauper rented in a mill any two pointing places that he chose to use: nor is it like the case of *Rex v. Hammersmith* (b), where the pauper rented the grinding of so many loads of corn. It may be said that the pauper only occupied the stall for thirty-eight days, inasmuch as between the 1st of November and the 14th of March there was only that number of market days when the stall was actually used, but no other person had the use of the stall during that period, and, therefore, the pauper must be taken to have occupied during the whole intervening period.

Bolland and *Shepherd* contra. There was not any occupation of the stall for a period of forty days, and the pauper, gained no settlement. It is stated as a fact,

(a) 8 T. R. 449.

(b) 8 T. R. 450 n.

that the pauper had a right of access to the stall on *Wednesdays* and *Saturdays* only; he could not, therefore, be said to occupy the stall at other times, when he had not the means of access to it: that being so, there was not a sufficient occupation to give a settlement. Besides, the occupation must be continuous. By the 13 & 14 *Car. 2. c. 12. s. 1.* a party may be removed within *forty* days after he comes to settle upon any tenement of the yearly value of 10*l.*: that statute is explained by the 1 *Jac. 2. c. 17.*, which enacts, that the forty days' *continuance* in the parish intended by the former act to give a settlement, shall be accounted from the time of the delivery of notice in writing of the house of his or her abode. Besides, the pauper did not come to settle upon this tenement; the stall was not demised to him, but he had a mere licence to use it on two days in the week. If the exercise of such a privilege be coming to settle upon a tenement within the statute, the occupation of an opera box for two days in the week will also be a coming to settle upon a tenement within the statute 13 & 14 *Car. 2. c. 12. s. 1.*

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ABBOTT C. J. I am of opinion that from the facts of this case the pauper occupied this stall for thirty-eight days only, and, consequently, that he did not gain any settlement.

BAYLEY J. I incline to think that there was a renting of a tenement within the statute of *Car. 2.* But I am clearly of opinion that the pauper occupied the stall for thirty-eight days only, and that being so, no settlement was gained in *Caversham*.

Order of sessions quashed.

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Wednesday,
November 16th.

The KING against The Inhabitants of ST. DUNSTAN in KENT.

A landlord demised a house and fixtures to a tenant, at an annual rent of 10*l.*; and the tenant paid rates in respect of the same; but the house was not rated at 10*l.* per annum: Held, that the fixtures being parcel of the tenement demised, and the whole together being of the annual value of 10*l.*, the tenant gained a settlement by this payment of rates.

BY an order of removal, dated the 29^d of *March* 1824, under the hands and seals of two justices for the city and county of the city of *Canterbury*, *M. Wilson*, widow, and her six children, were removed from the parish of *Saint Mary, Northgate*, in the said city and county, to the parish of *Saint Dunstan*, in the county of *Kent*. Upon appeal to the court of quarter sessions for the city and county of the city of *Canterbury*, the order was abandoned as to the two eldest children, but was confirmed as to the other paupers, subject to the opinion of this Court, on the following case.

On the part of the respondent parish it was proved, that the pauper's husband had on the 29^d *April* 1823, gone to live in a house in the parish of *Saint Dunstan*, at the yearly rent of 10*l.*; that he had not occupied it for a year, but that he had been rated for the house in that parish, and had paid the assessment for one quarter; that one *Butler* had occupied the house before the pauper's husband; that at the time of the hearing of the appeal one *Hunt* held it, each of them paying the annual rent of 10*l.*; and that it had for six years preceding the pauper's tenancy been let together with the articles of furniture hereinafter mentioned, at 10*l.* per annum.

On the part of the appellant parish it was proved, that all houses in the parish of *Saint Dunstan* were rated at half their actual value, and that in the assessment

ment on the pauper's husband, the said house was valued at 3*l.* 10*s.*; that at the time of his occupation the house was in a very bad state of repair, and that it would have required an expenditure of 40*l.* to put it into tenantable condition; that since his death, and previously to *Hunt's* tenancy, 12*l.* had been expended on it; that there were a stove and cupboard in a room below stairs, a grate and a cupboard in the chamber, and a grate in the kitchen; that the stove and grates had not originally belonged to the house, but had been put in by a tenant, and the landlord had taken them in part payment of rent about six years before; that these were fixed with brick work in the chimney places, but that they might be removed without doing any injury to the chimney places; that the cupboards stood on the ground, and were supported by held fasts, and that these might also be removed without doing any other injury to the walls than leaving a few marks of nails; that the use of these several articles was worth about 6*d.* per week; and that the tenement, including the use of them, was worth 7*l.* 10*s.*, and without them about 6*l.* per annum. The court of quarter sessions confirmed the order, but stated their opinion to be, that if any deduction, however small in amount, was to be made in respect of the above mentioned articles, the tenement would not be of the annual value of 10*l.*

Berens and *Starr* in support of the order of sessions. The question in this case is, whether the fixtures give an additional value to the house itself so as to make it of the yearly value of 10*l.* It will be said on the other side, that as the house without the fixtures is not of that annual value no settlement was gained, because the pauper did not pay rates in respect of a tenement of that value

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value as required by the statute 3 & 4 W. & M. c. 11. Here, the articles were fixtures attached to and constituting part of the freehold; they, therefore, were part of the tenement. It is true, that the rule established by *Elwes v. Maw* (a) has been relaxed in favor of things set up for the purposes of trade, and in such cases it has been held, that the tenant has a right to remove them. But this, perhaps, may be assimilated to the cases where an additional value has been given to the house in consequence of an erection in it, such as a carding machine affixed to a building, or the machinery of a malt-house, or a billiard table. Now, such erections have been considered to be part of the building itself, as much as the glass in the windows. *Colegrave v. Dias Santos* (b) is expressly in point, for it shews that by a sale of the house, no mention being made of the fixtures, they would pass with it, they must therefore be considered as parcel of the freehold when it is demised.

Marsham and Brodrick contra. The pauper did not pay rates in respect of a tenement of the annual value of 10*l.*, for the fixtures did not form any part of the tenement, because they were of such a nature, that if they had been placed in the tenement by the tenant during the term, he might have removed them at or before its expiration; *Beck v. Rebow*. (c) Although, therefore, the pauper paid 10*l.* per annum to the landlord, that sum was paid, not merely for that, which in point of law constituted the tenement, but for the tenement and somewhat more, viz. the fixtures, which, although they belonged to the landlord and were used by the tenant, constituted no part of the tenement. The old rule as

(a) 3 *East*, 51.(b) 2 *B. & C.* 76.(c) 1 *F. Wms.* 94.

to fixtures was, “quod ab ædibus non facile revellitur” becomes a member of the inheritance, and passes to the heir; *Spelman's Gloss.* 277. If tried by that rule, these articles would form no part of the tenement. But the rule has been relaxed in cases between landlord and tenant; *Elwes v. Maw.* (a) The rule thus relaxed must prevail in the present instance. The question raised by this case was not decided in *Rex v. Whitechapel* (b), or in *Rex v. North Bedburn* (c), because, although in each of those cases some articles were demised beyond the mere tenements, the sessions did not state the value of such additional articles; and add their opinion, that if any thing was to be deducted in respect of such articles the tenement would not be worth 10*l.* per annum. In *Rex v. White* (d) it was decided that furniture was not rateable, and merely because the person who makes the rate cannot get into the house, to ascertain whether the furniture is valuable or not, and the same reason applies to fixtures. If, therefore, in ascertaining the annual value of the tenement, fixtures and furniture are to be taken into the account, while they cannot be rated, they are made the means of burthening the parish, while they cannot be made the means of relieving it in proportion. Assuming, however, that the fixtures constituted part of the tenement, and that the whole was of the annual value of 10*l.*, the question arises, whether a settlement by payment of rates can be gained, unless in respect of a tenement valued in the parish assessment at 10*l.* By the 3 & 4 *W. & M. c. 11. s. 6.* it is enacted, “that if any person who shall come to inhabit in any town or parish shall be charged with, and pay his share towards the public taxes or levies of the town

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(a) 3 *East*, 51.(b) 2 *Bott.* 102.(c) *Cald.* 452.(d) 4 *Term Rep.* 770.

or

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or parish, he shall be adjudged and deemed to have a legal settlement in the same." The rating by the parish was considered tantamount to an acknowledgment by them that the party rated was a parishioner, and the amount of the rate, or the value of the tenement in respect of which he was rated, was wholly immaterial. But the 35 G. 3. c.101. afterwards enacted, that no person should gain a settlement by payment of any public taxes for or in respect of any tenement not being of the yearly value of 10*l*. Now as the adoption by the parish of the party paying the rates as a parishioner is the foundation of the settlement gained by the payment of rates, and as the statute requires that it shall not give a settlement unless it be in respect of a tenement of the yearly value of 10*l*., it follows that the parish do not recognise a man as a settled parishioner, unless they assess him at 10*l*. per annum, and cessante ratione cessat ipsa lex. Therefore, as the rating is the acknowledgment; and the acknowledgment is the ground of settlement, if there be no acknowledgment when the pauper is rated under 10*l*. per annum, there is no ground of settlement. Nor is it unreasonable that a parish should have it in its power to set a value of 10*l*. per annum on a tenement, before it can be said to have adopted its inhabitant as its parishioner. The assessment, too, all fraud apart, is the best criterion of value, inasmuch as but little litigation can arise, when the question is to be decided by the inspection of the rate, which is open to all; but if the assessment is not to be the test, the rent must be resorted to, which is a matter of contract between two persons only, both of whom have an interest in keeping the parish in the dark as to its real amount, in order that it may be rated as low as possible.

ABBOTT

ABBOTT C. J. It is found as a fact in this case that the articles were the property of the landlord, and were fixed to the freehold; and that they were taken by the pauper as the property of the landlord: I am therefore of opinion that they constituted parcel of the tenement demised. But it has been contended, that in order to gain a settlement by payment of rates, the party must not only pay rates in respect of a tenement of the yearly value of 10*l.*, but that the tenement must be actually rated at that sum in the assessment. The statute, however, says, that it is sufficient if the rate be paid in respect of a tenement of the yearly value of 10*l.* Now the case states that the pauper's husband was charged with, and paid rates in respect of a tenement of that value; that, according to the words of the statute, was sufficient to confer a settlement in the parish of *St. Dunstan's*.

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BAYLEY J. It has been argued that no settlement could be gained unless the pauper were rated for a house estimated in the assessment as of the annual value of 10*l.* Whether that would be a proper line to adopt it is not necessary for us to say, because the legislature has said that it is sufficient if the party pays rates in respect of a tenement of the yearly value of 10*l.* Although these fixtures, if they had belonged to the tenant, might have been removed by him during the term, yet as they actually belonged to the landlord, they were parcel of the freehold, and would have gone to his heir, and not to his executor. The tenement, therefore, was of the annual value of 10*l.*

LITLEDALE J. concurred. (a)

Order of sessions confirmed.

(a) *Holroyd J.* was absent in the bail court.

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The KING against JOHN JARAM.

By letters patent reciting that the liberty of *H.* was an ancient liberty, and that the lords were bailiffs of the same, and had exercised returns and executions of writs and processes within the liberty, the king granted to *A. B.* his heirs and assigns, that he should have within the liberty of *H.* the return and execution of all writs, processes, and precepts of his majesty, by the lords' proper bailiffs, officers, and ministers, so that no sheriff of the king, his heirs or successors, should enter into the liberty to execute any thing, unless it touched his majesty or his crown, or in default of the lords' bailiffs and officers.

The bailiffs of the liberty had regularly attended the quarter sessions, and made returns of the jurors resident within the liberty: Held, that the bailiff of the liberty was bound in obedience to the precept of the sheriff, to summon the jury within the liberty, to attend the quarter sessions.

The court of quarter sessions made an order, that *A. B.* the acting bailiff of the lordship of *H.* be fined 10*l.* for refusing contrary to the duty of his office, and to ancient usage, to summon the jury from the lordship to attend at the quarter sessions, he the said *A. B.* having been duly required so to do by warrant from the sheriff: Held, that this order was good, although it did not appear that the bailiff was summoned to attend at the sessions, it being his duty to do so without summons.

A RULE nisi had been obtained for quashing the following order, made by the justices of the peace for the East Riding of the county of *York*, at their general quarter sessions, held on the 11th of *January* 1825: "Ordered, that *John Jaram*, the acting bailiff of the seigniori or wapentake of *Holderness*, in the East Riding of the county of *York*, be fined 10*l.* for refusing, contrary to the duty of his office, and to *ancient usage*, to summon the jury, from the said seigniori or wapentake, to attend at the general quarter sessions of the peace, held at *Beverley*, for the said Riding, on the 11th day of *January* 1825, he, the said *John Jaram*, having been duly required so to do by warrant from the sheriff of *Yorkshire*, dated the 30th day of *December* 1825."

The affidavits in support of the rule stated the following facts: Sir *T. A. Clifford Constable*, of *Burton Constable*, in *Holderness*, baronet, by virtue of several letters patent under the Great Seal of *England*, was seised and possessed of the seigniori or lordship of *Holderness*, in the county of *York*, together with the jurisdictions belonging to the same seigniori or lordship. By the last letters patent of the 31st day of *December*, in the

16th *Charles II.*, after reciting, amongst other things, certain former letters patent, granted by King *Philip* and Queen *Mary* to *Henry* Earl of *Westmoreland*, and by King *Charles I.* to *Henry Constable* Viscount *Dunbar*, and that the liberty of *Holderness* was an *ancient* liberty, and that the lords thereof were bailiffs of the same liberty, and had and exercised returns and executions of writs and processes within the same liberty, and other rights and franchises therein, King *Charles II.* did, among other things, give and grant to *John* Viscount *Dunbar*, his heirs and assigns, that he and they should have, within the said liberty of *Holderness*, the return and execution of *all and singular writs, processes, mandates, warrants, and precepts* of his said majesty, his heirs and successors, by the proper bailiffs, officers, and ministers of the said *John* Viscount *Dunbar*, his heirs and assigns from time to time, there to be returned, done, and executed; so that no sheriff of his majesty, his heirs or successors, should enter into the liberty of *Holderness*, or into any town, village, leet, or hamlet, within the whole wapentake or hundred of *Holderness*, to do or execute any thing belonging to his office, *unless it touched his said majesty or his crown*, and unless upon the default of the bailiffs and officers of the said Viscount *Dunbar*, his heirs or assigns, with the special writ of non omittas in that behalf first had and obtained. And the king thereby, for himself, his heirs and successors, did finally enjoin and command his sheriff, and the sheriff of his heirs and successors of the county of *York* for the time being, and every of them, upon all and singular writs, processes, mandates, warrants, and precepts delivered, or to be delivered into their hands for ever thereafter, for any execution thereon to be made or done within the

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said liberty of *Holderness*, or within any town, village, leet, or hamlet within the whole wapentake and hundred of *Holderness*, immediately and without delay after the receipt of every such writ, process, mandate, warrant, or precept, to make his and their mandates, warrants, or precepts thereupon, and to direct the same to the bailiffs, officers, and ministers of the said Viscount *Dunbar*, his heirs and assigns of his liberty aforesaid for the time present then being, and to no other person or persons whatsoever, and to command the due execution thereof to be made by the aforesaid bailiffs, officers, and ministers of the said Viscount *Dunbar*, his heirs and assigns, from time to time as aforesaid, *unless it touched his said majesty or his crown, and unless upon default and with the special writ of non omittas as aforesaid.*" It further appeared, that one *Iveson* executed the office of deputy chief bailiff of the said seigniory or lordship of *Holderness*, and the defendant *Jaram*, that of under acting bailiff of the said seigniory or lordship; and that he, *Iveson*, had been advised that, according to the true construction of the letters patent, the return and execution of writs and process so given and granted by the letters patent was confined to civil process; and that he, the chief bailiff, thought it proper, for the rights and interests of Sir *T. A. Clifford Constable*, to order the defendant *Jaram* no longer to execute the precepts of the sheriff to summon jurors within the said liberty of *Holderness*, to the intent and purpose that the question might be fairly tried between Sir *T. A. Clifford Constable* and the sheriff, whether the bailiffs of Sir *T. A. Clifford Constable* were bound to obey and execute such precepts of the sheriff; that at the quarter sessions of the peace for the said East Riding, on the 11th of *January*

January last, a complaint was made to the magistrates there assembled by the under sheriff for the East Riding, against *Jaram*, for disobedience to the precept of the sheriff, which had been previous to the said sessions directed to him, *Jaram*, to summon jurors from the liberty of *Holderness*, to attend at the same sessions; and it was at the same time urged by the under sheriff, that a fine should be imposed by the magistrates upon *Jaram* for such disobedience; that the chief bailiff, on the part of *Jaram*, contended before the magistrates that *Jaram* had not disobeyed any order of the Court, and that it was not, therefore, competent for the Court to fine him as no contempt had been committed. But the Court, nevertheless, made the order in question. It appeared by the affidavit of the deputy clerk of the peace for the East Riding, that since 1787, when he was appointed to that office, the bailiffs appointed by the high sheriff of the county for the time being, as well as the bailiffs appointed by the bishop of *Durham* in right of his see for the wapentake or liberty of *Howden-shire*, and by Sir *T. A. Clifford Constable*, Baronet, and his ancestors, for the wapentake or liberty of *Holderness*, both in the said Riding, had, during the time that he had been deputy clerk of the peace as aforesaid, regularly attended the general quarter sessions, making returns of the jurors resident and summoned within their respective divisions, and remaining in court in their character as officers of the court during all the time the sessions were held, which usually continued two days or more, until the *Epiphany* general quarter sessions in the year 1823, when *John Jaram* was fined the sum of 5*l.* for being absent without leave of the Court. The affidavit further stated, that in the North Riding there

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were several bailiffs appointed by lords of liberties independent of the high sheriff of the county; and that such bailiffs attended the general quarter sessions for that Riding, in the same manner and for the same time as the bailiffs who were appointed by the high sheriff.

Coltman shewed cause. The question in this case is whether the lord of the franchise of *Holderness* is bound to execute the process for returning jurors within the liberty or not. It will be contended on the other side that he is bound only to execute civil process, but no instance is to be found of such a limited franchise of *retornum brevium*. The words of the letters patent are general, authorizing the lords to make return of all writs, processes, &c. The exception in the non *intromittat* clause is no more than the law itself would imply, and then the rule applies, "*Expressio eorum quæ tacite insunt nihil operatur*." In *Com. Dig. Retorn*, B. 2. it is laid down, "that on default of the bailiff the sheriff may enter a franchise, and therefore, if a bailiff does nothing upon the sheriff's mandate, a writ goes to the sheriff *quod non omittat propter aliquam libertatem by the common law*," and *ib.* B. 3. "So, if the bailiff makes an insufficient return, or if the king be party, the sheriff may enter the franchise without a non *omittas*, as upon process against a felon." *Dalton's Sheriff, Bailiffs of Franchise*, 462. 186. 2 *Inst.* 453. *Plowden's Comm.* 216a. and *Atkyns v. Clare* (a), are authorities to the same effect. And 2 *Hawkins P. C. c. 8. s. 50.* is an authority to shew that the process is properly directed by the sessions to the sheriff, and by the latter to the bailiffs of liberties. Independently, therefore, of any statutable provision, the bailiff of this liberty was bound by the very terms of

(a) 1 *Ventr.* 402.

the grant to summon the jury within the liberty. But all doubt upon the subject is removed by the 27 H. 8. c. 24. s. 7. by which it is enacted, that all stewards, bailiffs, and other ministers of any liberties or franchises which *in times past* have used or ought to attend upon the justices of assize, justices of gaol delivery, and justices of the peace at large in any county, shall be attendant to the justices, &c. of the same shires wherein such liberties and franchises be, and make due execution of all process to them to be directed, for ministration of justice within such liberties or franchises; and that also all such bailiffs or their deputies or deputy, shall give their attendance and assistance upon the sheriff, together with the sheriff's bailiffs, at all courts of gaol delivery, from time to time, for execution of prisoners according to justice." That statute, therefore, compels the attendance of bailiffs of franchises where there had been an ancient usage for them to attend, and the execution of process in all cases in which they had executed it in times past. Now, in this case, there was an ancient usage for the bailiff of the liberty to summon jurors. That appears upon the face of the order, upon the affidavit, and the defendant by not denying has admitted it. But it may be said that that usage is not as old as the statute of H. 8. It is sufficient, however, to shew that it may be as old, for every thing will be presumed to support an established usage. Assuming that the bailiff has been used to execute the summons, if the grant of the franchises of *Holderness* made it obligatory on the bailiff to do so, then there is no question in the case; if it did not, then the custom, being, as it is, a burdensome one, must be referred to some legal obligation, and if the bailiff was used to execute such process before the statute of 27 H. 8. there would be a legal

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obligation on him to continue to do so. There is no reason to infer from the letters patent that the liberty was not an ancient one previous to the time of *H. 8.*, but rather the contrary. In *Constable's case (a)*, it is said that King *Philip* and Queen *Mary* were seised of the manor and fee of *Holderness* in their demesne as of fee in right of the crown. But that is not inconsistent with the franchise being more ancient than the time of *H. 8.* because such a franchise does not merge in the crown. (*b*)

J. Williams and *Deacon*, contra. The order is insufficient in point of law. It does not appear on the face of it that the warrant was ever delivered to the defendant, or that he was summoned. It is merely stated, that he refused to summon the jurors, according to *ancient usage*. The statute of *H. 8.* contemplates the bailiffs of liberties, who, at the time of the passing of that statute, had been used to execute process and attend the justices. But the words "ancient usage" in the order, apply to dates much subsequent to that time. It does not, therefore, appear that he was bound to attend, nor does it appear on the order that the defendant ever was heard. [*Bayley J.* It is a common practice, in default of a juror's attendance to call the summoning bailiff to prove the service of the summons, and then to fine the juror in his absence. It was the duty of the officer, in this case, to summon the jury, and also to be present at the sessions to present his return.] The order does not state that he was duly required to attend; and, assuming that it imports that he was required by the service of the sheriff's warrant, still he ought to have been sum-

(a) 5 Co. 106.

(b) 9 Co. 26 b. *Alkyns v. Clare*, 1 *Ventriss*, 408.

moned;

moned; and if he had, he might have shewn some excuse for not summoning the jurors, or that the service of the warrant on him was irregular. It ought to appear on the face of the order that the defendant had been duly summoned to attend, *Rex v. Benn* (a). Then, as to the principal question. By the letters patent the sheriff has the power to execute, within the liberty, writs and process upon all matters "touching his majesty or his crown;" and the non intromittat clause relates to *civil* process merely, and not to *criminal* process. The bailiff of the lord, therefore, was not bound to obey the precept of the sheriff to summon jurors for the sessions, but the sheriff was bound to perform that duty by *his own officers*. The process contemplated by the 27 H. 8. c. 24. s. 7., which directs that bailiffs of liberties shall "make due execution of all *process* to them to be directed for ministration of justice within such liberties," is only such process as shall be directed to bailiffs by "the justices of assize, justices of gaol delivery, or justices of the peace," and not any process issued by the *sheriff*. And the last part of the section, which says that "all such bailiffs or their deputies shall give their attendance and assistance upon the sheriff, &c. at all courts of gaol delivery, for execution of prisoners according to justice," intends only that the bailiffs of liberties are to attend such courts, for the purpose of assisting the sheriff in his duties *there*, and executing such orders relating to the prisoners as the *Court*, not the sheriff, shall issue. This construction of the statute is strengthened by what is laid down in the year-books (a), as to the duties of the sheriff upon this very point, and

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(a) 6 Term. Rep. 198.

(b) 19 H. 6. 67 a.

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which is cited in *Com. Dig. Return*, D. 3. It is there said, that upon process at the suit of the king, or upon a *distringas juratores*, a sheriff cannot return *mandavi ballivo*, &c., for he himself must execute it at any place within his county. Now, the bailiff here does not, as in many cases, unite the characters of sheriff's officer and bailiff to the lord, but is peculiarly and entirely the lord's servant; and the question is, therefore, whether, when the sheriff has certain duties imposed on him by law, he can fling off the burthen from himself, and impose it on another person who is not his servant, and over whom he has no control? The authorities cited on the other side do not apply to this case; they relate to *civil* process only, and not to criminal. The question also is not, as is there put, whether the sheriff may not enter the liberty upon the default of the bailiff, (which it is admitted he may do, both by law and by the exception contained in the non intronittat clause of the letters patent); but whether he may in the first instance *without any default*, order the bailiff of the lord to do what he the sheriff ought to do himself. Here the fine imposed is not for non-attendance, but for refusing to obey the sheriff's precept, previously issued to summon jurors. The passage from *Hawkins* (a) does not shew that process goes from the sheriff to the bailiff of the liberty, but that the sheriff is "to give notice (merely) to all stewards, constables, and bailiffs of liberties, to be present, and do the duties, at such day and place, &c." On the contrary, it is expressly laid down by *Hawkins* in his Chapter on *Process*, (Vol. ii. 404. s. 17.,) that wherever the king is a party to a suit, (as he certainly is to all informations and indictments,)

(a) 2 Hawk. P. C. c. 8. sect. 50.

the process ought to be executed by the sheriff himself, and not by the bailiff of any franchise, whether it have the clause of *non omittas* or not."

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The sessions too have no jurisdiction to decide questions of duties of office in this summary way between the sheriff and those who, as he contends, owe service to him; and even if the right of service were clear, the sessions had no authority to impose a fine in the present mode, for neglect of such service. In *Hall v. Turbett* (a), a fine imposed by the steward of a court leet for not coming to court, and doing suit, was held to be illegal; for it ought not to be without *presentment* that he ought to do suit at court, and he shall rather be amerced than fined. And *Anderson C.J.* added, "of offences *within the cognisance* of the steward as judge, he may assess a fine, but *not of others*, except they be presented; for non constat to the steward, whether he were resident within the leet or not, or what cause he had for his absence." So here the offence charged of refusing to summon the jury, was not an offence within *the cognisance* of the sessions, and if they could legally interfere in any manner, it should have been by virtue of a formal *presentment*, and then the bailiff should have been amerced, instead of *fined*. And *Com. Dig. tit. Justices of Peace, D. 7.* is to the same effect, viz. "If coroners, constables, &c., do not appear at the sessions, the justices may amerce them." A fine can only be for a contempt of Court, and here there was no contempt; the fine is imposed for a by-gone transaction as to a disputed matter of right, and one too that occurred between the *sheriff* and the bailiff, and not between the *Court* and the bailiff.

(a) *Cro. Eliz.* 241.

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ABBOTT C. J. This case comes before the Court on a rule obtained to quash an order of sessions, and the object of that proceeding was to try the question whether the bailiff of the liberty, or the sheriff, was bound to summon certain jurors to attend the Court of quarter sessions. Now that is a sufficient reason for our not entering with any very critical nicety into the particular form of the order, though I must say that I can see no reasonable objection to the order, because, in support of it, every thing must be presumed to have been rightly done. It was the duty of the bailiff of the liberty to be present at the sessions, and that being so, it was not necessary to summon him. Besides, here at the time when the fine was imposed, the defendant's attorney was present, and was heard, and the Court decided that a fine should be imposed. Then the next objection is, that it does not appear upon the face of the order that the defendant was duly required to summon the jurors, but I think we must intend in support of the order that the warrant was transmitted to him in due time, especially as it appears by the affidavits that this proceeding has been instituted for the purpose of having the real question between the parties decided. That question is, whether the sheriff, or the bailiff of the liberty, is bound to summon jurors there. According to the passage cited from 2 *Hawkins' Pleas of the Crown*, c. 8. s. 50. the justices are to direct their precepts, under their teste, to the sheriff, for the summons of the sessions of the peace, thereby commanding him to return a grand jury before them at a certain day and place, and to give notice to all stewards, constables, and bailiffs of liberties, to be present, and to do their duties, &c. It appears to have been the constant usage for the bailiffs of this and other liberties within the Riding to attend the quarter

quarter sessions, and to make return of the jurors resident and summoned within their respective divisions, in their character of officers of the Court. That being the usage, and it appearing that by law the sheriff has a right to direct his process to the bailiffs of liberties, I think the defendant was bound to summon the jurors, and that the fine was properly imposed. The rule for quashing the order of sessions must, therefore, be discharged.

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BAYLEY J. I am of opinion that upon the true construction of this charter and of the statute of *H. 8.*, the bailiff of this liberty was bound to execute process of this description, and that his duty in that respect is not confined to the execution of civil process. By the charter the lords of the liberty were to have the return of all writs, processes, &c. by their proper bailiffs, so that no sheriff should enter the liberty, unless it touched his majesty, or his crown, or on default of the bailiff of the liberty. A general power was, therefore, granted to the lord of the liberty to execute process within the liberty by his bailiffs. Then by the statute of *H. 8.* all bailiffs of liberties, &c., who *in times past* have used or ought to attend upon the justices therein mentioned, and, among others, justices of the peace, shall attend upon the same justices, and make due execution of *all* process to them to be directed for ministration of justice within the liberties. That statute, therefore, recognizes the liability of bailiffs of liberties, who by ancient usage had been accustomed to do certain duties before that act. I agree that this statute applies to those officers only who in times past had been used to attend upon the justices of assize, &c. The charter recites, that the liberty was an ancient liberty, and that the lords were bailiffs, and had and exercised returns of writs, &c.; the presumption therefore

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therefore is, that it was a franchise existing at the time of the passing of the statute of *H.8.*, there being no evidence to the contrary. It appears by the passage cited from *Hawkins* that the usual practice is for the sheriff to command the bailiff to execute the process within the liberty. That being so, I think the Court of quarter sessions may at their option proceed, either against the sheriff, or the bailiff. I do not enter into the question of form; but for these reasons I think the rule for quashing the order of sessions must be discharged.

LITLEDAL J. concurred. (a)

Rule discharged. (b)

(a) *Holroyd J.* was in the Bail Court.

(b) See the form of a precept to summon the sessions, in *Lamb. Ems.* b. 4. c. 2.

Friday,
November 18th.

MORROW *against* BELCHER and Two Others.

Trespass against three, for assault and battery. Plea, not guilty, by all; and by one a justification in defence of his freehold. Replication, that he used more force than was necessary. Rejoinder, that all the defendants did not use more force than was necessary. Demurrer and joinder: Held, that the replication was good, and the rejoinder bad.

TRESPASS against three for an assault and battery.

Plea, first, by all the defendants, not guilty. Secondly, by *Belcher*, that he committed the assault in defence of his freehold. Similiter to the general issue, and replication to *Belcher's* justification, that he used more force than was necessary. Rejoinder by all the defendants that they did not use more force than was necessary. Demurrer and joinder.

Chitty in support of the demurrer was stopped by the Court.

E. Lawes contra. The declaration complains of a joint trespass by all the defendants. In *Kiffin's* case,

case (a), which was trover against two, "one pleaded not guilty, and the other a release, and it was found for the plaintiff against the first, and for the defendant upon the release; and the judgment was quod querens nil capiat per billam, *for he made it joint*; so, if in trespass against two, one pleads not guilty, and the other claims property, and it is found against the former, and for the latter, the plaintiff cannot have judgment, and no difference between trespass and trover." That is applicable to the present case. The pleas only make a separate defence to the joint complaint. The replication applies to a separate ground of complaint against *Belcher* alone, viz., that he used more force than was necessary; the whole action is, therefore, discontinued, and the defendants are entitled to judgment. In *Tippet v. May and others* (b) the plaintiff declared in assumpsit against three; two pleaded a debt of record by way of set off, without taking any notice of the third. The plaintiff replied nul tiel record, and gave a day, to produce the record, to the two defendants who pleaded, but entered no suggestion on the roll respecting the third. On demurrer it was held that the action was discontinued, and that judgment must be given against the plaintiff.

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ABBOTT C. J. Whatever ground there might be for the argument now urged, if applied to an action of assumpsit, it is clearly unavailable in the present case. Trespass is a joint and several action, and the plaintiff may recover against any one or more of the defendants. Suppose *Belcher* alone had pleaded, the plaintiff might have signed judgment against the others for want of a plea, and would it not have been absurd for them after-

(a) *Comb.* 310.(b) 1 *B. & P.* 411.

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wards to join in the rejoinder. Now I cannot see that any material difference is made by their having pleaded the general issue, to which the similiter has been added.

BAYLEY J. The plaintiff charges three with a trespass; two have no justification, but they deny the fact; the third pleads that he has a justification, and the plaintiff replies that he has not, because he used more force than was necessary for the purposes mentioned in his plea. It cannot be any answer to that replication that all the defendants did not use more force than was necessary.

HOLROYD J. concurred.

LITLEDALE J. It is a fundamental rule in pleading that the replication must pursue the plea, and the rejoinder the replication. The rejoinder does not do so in the present case: it is, therefore, bad.

Judgment for the plaintiff (a)

(a) See *Holland and Drake's case*, 2 Leon. 199.

Friday,
November 18th.

JOHN DOE on the several Demises of JOSEPH FOSTER, MARY FOSTER, and BETTY WOOD, against SCOTT.

Copyhold lands were granted to A. for the lives of herself and B., and in reversion to C.

for other lives.

A. died, having devised to B., who entered, and kept possession for more than twenty years. On his death C. brought ejectment: Held, that the action was barred by the statute of limitations, for that C.'s right of possession accrued on the death of A., inasmuch as there cannot be a general occupant of copyhold land.

EJECTMENT for messuages and lands situate in North Curry, in the county of Somerset. At the trial before Hullock B., at the Somerset Spring assizes,

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1823, a verdict was found for the plaintiff, subject to the opinion of this Court, upon the following case :—The lessor of the plaintiff, *Mary Foster*, widow, formerly *Mary Coggan*, claimed the estate in question, as the daughter of *Anthony Coggan*, deceased, and produced the following copy of court-roll. “Manor of *Knapfee*. The court-baron of the worshipful the dean and chapter of the cathedral church of *Wells*, lords of the said manor, held at *North Curry*, the 16th of *October* 1770, in the time of the reverend *John Payne*, clerk, master of arts, one of the canons residentiary of the same cathedral church, being steward. To this court came *Anthony Coggan*, and took of the said lords the reversion of three acres, more or less, of arable land, in *Burrough Field*, of overland, with the appurtenances within the said manor, late in the possession of *Mary*, wife of *Thomas Exon*, deceased, to have and to hold the said reversion and premises, with the appurtenances, unto *Mary*, now aged about twenty years, *Betty*, now aged about fourteen years, and *Richard*, now aged about twenty-one years, son and daughters of the said *Anthony Coggan*, for the term of their lives, and the life of every and either of them longest living, successively, according to the custom of the said manor, immediately after the death, surrender, forfeiture, or other sooner determination of the estate of *Penelope Culverwell*, for her own life, and the life of *Thomas Exon*, son of the said *Thomas Exon*, of and in the said premises, under the clear yearly rent of 5s. 1d. ; and also doing and performing their work towards digging and cleansing the said lord’s rivers, according to the rates of the said premises, when and as often as need shall require ; and under all other burdens, works, heriots,

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heriots, suits, services, and customs therefore formerly due and of right accustomed; and for such an estate in reversion so to be had in the said premises as aforesaid, the said *Penelope Culverwell* gave to the said lords a fine of 4*l.* 1*s.* 6*d.*, before-hand paid, and so forth." The lessor of the plaintiff also proved, that *Penelope Culverwell* died on the 25th of *June* 1779, and *Thomas Exon* died in *September* 1821. On the part of the defendant the following copies of court-roll were produced;—"The court-baron of the worshipful the dean and chapter of the cathedral church of *Wells*, lords of the said manor there held, on *Monday*, the 17th day of *August* 1752, and in the time of the reverend *John Walter*, clerk, master of arts, one of the canons residentiary of the said cathedral church, being steward. To this court came *Penelope Culverwell*, and of her own purchase hath taken from the said lords the reversion of three acres, more or less, of arable land in *Burrough Field*, of overland, with the appurtenances within the manor aforesaid, now in the possession of *Mary Exon*, wife of *Thomas Exon*, for the term of her life, to have and to hold the said reversion and premises, with the appurtenances, unto the said *Penelope Culverwell*, for the lives of herself and *Thomas Exon*, son of *Thomas Exon*, and for and during the life of every and either of them longest living successively, according to the custom of the manor. The reversion, when it shall happen, to commence immediately after the death, surrender, forfeiture, or other sooner determination of the estate of the said *Mary Exon*, of and in the said premises, under the yearly rent of 5*s.* 1*d.*, and for an heriot 10*s.*, when it shall happen. And also doing and performing their work towards digging, &c.

And

And for such an estate in reversion so to be had in the premises aforesaid, the said *Penelope Culverwell* gave to the said lords 5*l*. for a fine, made this year, and paid before-hand; and so, the said *Penelope Culverwell* and *Thomas Exon*, the son, are admitted tenants in reversion, but their fealty is respited, and so forth." The following surrender appeared on the rolls.

Manor of *Knapfee*, 4th June 1782.

Homage. Mr. *John Powell*, Mr. *John Gridley*; sworn to testify the truth of the under-written surrender.

To this court came the reverend *Thomas Exon*, devisee and sole executor of the last will and testament of *Penelope Culverwell*, and surrendered into the hands of the said lords, three acres, more or less, of arable land in *Burrough Field*, of over-land, with the appurtenances, within the said manor, which he claims to hold, by two several copies of court roll of the said manor, one bearing date the 17th day of *August* 1752, and the other the 16th day of *October* 1770, for the lives of himself and *Mary Coggan*, now *Foster*, *Betty Coggan*, now *Betty Wood*, and *Richard Coggan*, children of *Anthony Coggan*, and the life of the longest liver of them; and all the estate, right, title, interest, property, possession, reversion, claim, and demand whatsoever, both at law and in equity, of him the said *Thomas Exon*, of, in, and to the said premises, and every part thereof, together with the two several recited copies of court roll, to be cancelled; to the intent that the said lords may do therewith their will, and pleasure.

To a court baron then held came *Robert Scott*, and of his own purchase took of the said lords three acres, more or less, of arable land, &c., with the appurtenances within the said manor, formerly in the pos-

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session of *Mary*, the wife of *Thomas Exon*, deceased, late of *Penelope Culverwell*, also deceased, but then in the lord's hands, by virtue of a surrender that day made, to have and to hold the said premises, with the appurtenances, unto the said *Thomas Exon*, clerk, for the term of his life, according to the custom of the said manor, under the yearly rent of 5s. 1d., and also doing, &c.; and for such estate so to be had in the said premises as aforesaid, the said *Robert Scott* gave to the said lords for a fine a competent sum of money; and so the said *Robert Scott* is admitted tenant, and hath done his fealty, and so forth.

To the same court baron came *Robert Scott*, and of his own purchase took of the said lords the reversion of three acres, more or less, of arable land, &c., with the appurtenances, within the said manor, formerly in the possession of *Mary*, wife of *Thomas Exon*, deceased, and late of *Penelope Culverwell*, also deceased, but then of *Robert Scott*, to have and to hold the said reversion and premises, with the appurtenances, unto *Mary Scott*, then aged about twenty-two years, *Sarah Scott*, then aged about eighteen years, and *Avis Scott*, then aged about sixteen years, heirs of the said *Robert Scott*, for the term of their lives, and the life of every of them longest living, successively, according to the custom of the said manor, immediately after the death, surrender, forfeiture, or other sooner determination of an estate then subsisting in the premises, for the life of the Reverend *Thomas Exon*, under the clear yearly rent of 5s. 1d., and also doing &c.; and for such an estate in reversion so to be had in the said premises as aforesaid, the said *Robert Scott* gave to the lords for a fine a competent sum of money; and so the said

said *Mary Scott*, *Sarah Scott*, and *Avis Scott* were admitted tenants in reversion, &c.

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The defendant was the devisee and sole executor of *Robert Scott*, deceased. In the manor of *Knapfee* the grant is usually made to the person paying the fine, whatever the habendum may be; and it is very unusual for any person paying the fine not to have the grant made to himself in his own name, but to some other person. No instance is known within twenty years, in the time of the present steward, of any person paying a fine on a grant, and not taking the grant in his own name, and not having any interest in his behalf stated in the habendum, who has ever exercised the right of passing his beneficial or equitable interest by surrender; but the steward said he believed it to be the reputed custom that such persons might surrender such beneficial or equitable interest. The questions for the opinion of the Court, were, first, if the lessor of the plaintiff be entitled to any estate and interest in the premises in question, under the said grant of 1770; and if so, whether the surrender of her life by *Thomas Exon*, devisee of *Penelope Culverwell*, did not divest the said *Mary Foster* of all her estate and interest? Secondly, whether, inasmuch as the legal estate, if any, of *Mary Foster*, accrued on the death of *Penelope Culverwell* more than forty years ago, during which period there has been an adverse possession, the plaintiff is not barred from maintaining an ejectment?

C. F. Williams, for the plaintiff. The grant of 1770 operated to vest the legal interest in possession in the lessors of the plaintiff on the death of *Thomas Exon*, for during the subsistence of the estate of *Penelope*

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Culverwell, the reversion was in the *Coggans*. It must be admitted that *T. Exon* had a legal estate in the premises for his own life, after the death of *Penelope Culverwell*; but at most he had only an equitable interest in the lives of the three *Coggans*. On the other side it must be urged, that the estate of the *Coggans* was defeated by some act done by *Penelope Culverwell* or *Thomas Exon*. The former did no act to defeat it, and the latter clearly not having any thing but an equitable estate, could not surrender it, for it is not the subject of a surrender.^(a) Whether this rule of law may or may not be altered by a custom is of no importance in this case, for the evidence of the steward by no means establishes such a custom; and even admitting that *T. Exon* could transfer the equitable interest, still the legal estate remained in the *Coggans*. Then, secondly, the lessors of the plaintiff are not barred by the statute of limitations. *P. Culverwell* died in 1779, and it appears by the surrender, bearing date the 4th of June 1782, that *T. Exon* was her devisee and sole executor. Now he did not die until 1821, and the right of the lessors of the plaintiff to the possession of the premises did not accrue until that time.

Selwyn, contra. *Mary Foster* took nothing under the copy of court roll of the 16th of October 1770. This instrument is unlike a common law conveyance, or the other copies set forth in the case; it is altogether sui generis. It purports to be a grant to *Anthony Coggan*, but it does not state that he took of his own purchase. The habendum is not to him, but to his three children;

(a) 1 *Walk. on Copyholds*, 58.

and

and at the conclusion it appears that *Penelope Culverwell* paid the fine. This instrument is void for uncertainty. It is true, that in general the Court will put such a construction as will support the instrument *ut res valeat*; but here, to do that would defeat all the equity of the case; for, according to *Dyer v. Dyer* (a), the estate in equity belongs to the person who pays the fine. Then, secondly, the estate of *Penelope Culverwell*, under the copy of court roll of the 17th of August 1752, determined on her death in 1779. The grant was merely to her for her life, and that of *Thomas Exon*, not to her and her heirs. *Thomas Exon* was a mere trustee, and could not take without a custom, and none is stated to exist: *Right v. Bawden*. (b) The estate of *Penelope Culverwell*, therefore, determined on her death; for there is no general occupancy of copyholds: *Smartle v. Penhallow* (c), *Doe v. Martin*. (d) *Penelope Culverwell* died in 1779, so that the title of the lessors of the plaintiff accrued more than twenty years before the commencement of this action, which is consequently barred by the statute of limitations.

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ABBOTT C. J. It appears that by copy of court roll of the 16th of October 1770, a grant was made to the *Coggans* of the reversion of the premises in question, to take effect immediately after the death, surrender, forfeiture, or other sooner determination of the estate of *P. Culverwell*, for her own life, and the life of *T. Exon*. Before we can say at what time that reversion would take effect, and become an estate in possession, it is ne-

(a) 1 *Watk. on Copyholds*, 216.

(b) 3 *East*, 260.

(c) 2 *Ld. Raym.* 994. 1 *Salk.* 188., *S. C.*

(d) 2 *W. Bl.* 1148.

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necessary to ascertain when *P. Culverwell's* estate determined. Looking at the grant in 1752 we find the estate granted to her for the lives of herself and *T. Exon*, and for and during the life of every and either of them longest living, successively according to the custom of the manor. By custom that estate might have enured either to *P. Culverwell's* heir, or to her devisee, or even to the person nominated as the second life. But no such custom is stated, and in the absence of that, we must look to the general rule of law. By that rule there is no general occupant of copyholds, nor any special occupant, unless expressly designated in the grant; and, therefore, it seems to me that we can only consider this as an estate enduring for the life of *P. Culverwell*. If it terminated at her death, the statute of limitations is a bar to this action. I hope that this decision will meet the justice, as well as the law of the case; of that I cannot be sure; but the very extraordinary form of the grant to the *Cuggans*, makes me strongly think that it will.

BAYLEY J. No special occupant is pointed out by the copy of 1752. The estate granted by it, therefore, determined on the death of *P. Culverwell* in 1779, there being no general occupancy of copyholds. That estate having ceased more than twenty years before the commencement of this suit, it is barred by effluxion of time.

HOLROYD J. concurred. (a)

Postea to the defendants.

(a) *Littledale J.* had gone to Chambers.

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SHAW and Others, Assignees of HOWARD and
GIBBS, Bankrupts, *against* PICTON, Clerk.

ASSUMPSIT for work and labour, money lent, &c., and upon an account stated, before the bankruptcy, money had and received, and account stated with the assignees since the bankruptcy. Plea, general issue. At the trial before *Abbott C. J.*, at the *London* sittings after *Hilary* term 1825, a verdict was found for the plaintiffs, damages 3500*l.*, subject to a reference of all matters in difference in the cause to Mr. Justice *Gaselee*, then at the bar, who, at the request of either party was to state on the face of his award any point of law which he might think expedient. The reference not having been completed during Mr. Justice *Gaselee*'s continuance at the bar, it was suggested by him, and agreed to by the parties (subject to the approbation of the Court) that he should state the facts in the shape of a special case, for the opinion of the Court, which he did as follows.

The bankrupt, *Howard*, for many years before, and until the month of *January* 1814, and the two bankrupts (who then became partners) from thence to the death of the late General Sir *Thomas Picton*, which

the person paying the money should declare the appropriation of it at the time of payment: it is sufficient, if it can be collected from other circumstances, that he intended at the time of payment to appropriate it to one account specifically. And, therefore, where *A.* having large demands against *B.*, upon bill transactions with himself, and also as agent for several persons to whom *B.* had granted annuities, secured by *C.*, caused an attorney to make application to *B.* and *C.* on behalf of these annuitants, and *B.*, in consequence of that application and the remonstrances of *C.*, the surety, paid to *A.* certain sums of money, without making any specific appropriation of them at the time of payment: Held, that *A.* must be considered as having received them on account of the annuitants, and that the latter were entitled to have those monies divided amongst them, in proportion to the amount of their respective demands.

A., being agent for the grantor and the grantee of an annuity, delivered an account to the grantee, by which it appeared that he, the agent, had received certain payments on account of the annuity; these payments, in fact, had not been received: Held, that the agent was bound by the account which he had delivered, unless he could shew that he had given credit for those payments by mistake.

If a party who owes money to another on two different accounts, makes a payment generally, the party receiving it may apply it to either. It is not necessary, however, that

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happened on the 18th of *June* 1815, were employed by the general, to purchase annuities for him, and they were in the habit of receiving the annuities, for which they charged him a commission of two and a half *per cent.*, and they in general acted in those and other matters as his bankers. From the death of the general, who made his brother, the defendant, his sole executor and residuary legatee, the bankrupts continued to receive the annuities for the defendant, for which they made the same charge of commission. The act of bankruptcy was committed on the 6th of *February* 1821, and the commission was dated the 21st of *August* in the same year. The bankrupts were in the habit of acting as agents for many other grantees of annuities, and also for some of the grantors, and their usual course was, in their own books, to enter on the credit side of the accounts of the grantees, and on the debit side of the accounts of the respective grantors, the instalments of the annuities, from time to time, as they thought fit, but not always at the precise periods when they became payable. There was no new account opened, or even any rest made in the account, on the commencement of the partnership between *Howard* and *Gibbs*, or on the death of *General Picton*; but the account was carried on regularly from the commencement in the bankrupt's ledger, with balances from time to time struck as the bankrupts thought proper. The defendant had a pass-book, which from time to time as he came to town, was left with the bankrupts, to be filled up with the several entries made in the ledger since the period at which it had been last left with them. The pass-book was not, however, a fac-simile of the ledger, inasmuch as it did not state the balances made from time to time in the ledger, but in it the balances

lances were struck at the times of making up the pass-book. No accounts were settled between them, except by such making up the pass-book, and returning it with the balances struck therein, as above stated.

In the year 1820, amongst other annuities held by the defendant, were an annuity of 80*l.* for three lives, granted in *February* 1809 to the late General *Picton* by *William Rowley*, and secured by an assignment of certain leaseholds to the bankrupt, *Howard*, and an annuity of 1075*l.*, granted to defendant by Lord *Alvanley*, and guaranteed by Lord *Foley*, upon their joint personal security.

This action was brought to recover the sum of 2992*l.*, being an alleged balance of monies advanced by the bankrupts, to or on the account of the defendant, a part of such balance, arising upon the account stated in the pass-book, by withdrawing from the credit side thereof several sums of money hereinafter specified, in respect of *Rowley's* and Lord *Alvanley's* annuities, which had been entered (*without being received*) with certain sums for interest.

In respect of *Rowley's* annuity, 361*l.* 11*s.* 3*d.*, being the excess of the several instalments of that annuity, entered on the credit side of the account, beyond the amount of the rents of the leasehold premises received by *Howard* and *Gibbs* respectively, after deducting the out-goings.

In respect of Lord *Alvanley's* annuity, 1075*l.*, the amount of a year's annuity, due 6th *December* 1819, and entered on the credit side of the account, under date of the 2d *March* 1820, and 268*l.* 15*s.*, the amount of a quarter, due 6th *March* 1820, entered on the credit side, under date of the 8th *June* 1820.

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In respect of interest, 204*l.*, interest on a bill for 1000*l.*, dated 19th *February* 1820, drawn by the defendant on *Gibbs*, and paid 15th *May* 1820, and 89*l.* 18*s.* 7½*d.*, interest on a bill for 500*l.*, drawn by defendant on *Gibbs*, dated 2d *September* 1820, and paid 9th *November* 1820. This interest is calculated to 15th *June* 1824. The plaintiffs made other claims, but upon an investigation of the account, independently of these sums, the arbitrator found the balance to be 126*l.* 15*s.* 9*d.* in favour of the defendant; and, therefore, if the plaintiffs were not entitled to strike out of the defendant's credit, or to recover any of the above sums, or if any not exceeding the said sum of 126*l.* 15*s.* 9*d.*, the defendant was entitled to the verdict.

With respect to those sums the facts were these. As to *Rowley's* annuity. By the deed granting that annuity, dated 4th *February* 1809, certain leasehold premises, held by *Rowley*, at rents amounting to 70*l.*, were assigned to the bankrupt, *Howard*, (a trustee named by General *Pickton*, and who in the transaction was his agent only, and not the agent of *Rowley*) in trust for securing the payment of the annuities in case of arrear, by sale or otherwise, and after the death of the persons for whose lives the annuity was granted, and payment of all arrears of the annuity, in trust, as to such part of the premises as should not have been sold, and the residue of the produce of such part as should have been sold, for *Rowley*, his executors, &c., and to be assigned, transferred, and disposed of, as he or they should direct.

In *March* 1811 *Rowley* became bankrupt, and *Howard* entered into the receipt of the rents of the premises from that time; and he, before the partnership, and
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he and *Gibbs* since the partnership, continued to receive the rents up to, and even beyond the time of their bankruptcy. The course, however, which they uniformly adopted in keeping their account with the *Pictons*, in their (the bankrupts) own books, and also in the pass-book, was not to enter on the credit side of the account the amount of the rents received, and the outgoings on the debit side, but to enter, on the credit side, the instalments of the annuity, and on the debit side to enter a charge of two and a half per cent. commission on each instalment. But a distinct account of the rents and outgoings was entered in the bankrupt's books under the name of *William Rowley*, stating on the credit side the rents received, and on the debit side the outgoings and the annuity from time to time credited to the *Pictons*. Of this account there was no evidence that the *Pictons* had any notice.

The state of their actual receipts and payments in this last account was as follows. The receipts during the life of the general were 372*l.*; since his death 801*l.* The disbursements during his life, including five years ground rent, were 526*l.*; since his death 332*l.*; so that the receipts in the whole exceeded the disbursements by 315*l.*; and that sum only was applicable to the discharge of the annuity. The instalments entered on the credit side of the account in the general's lifetime were 324*l.*, and since his death 352*l.*, making in the whole 676*l.*, leaving an excess of 363*l.* above the sum actually received by the bankrupts.

As to the 1075*l.* and 268*l.* 15*s.* on account of Lord *Alvanley's* annuity, the facts were these: the 1075*l.* for a year's annuity having become due on 6th *December* 1819, the defendant, in *January* 1820, wrote to the bankrupt, *Gibbs*, to enquire whether the arrears had been paid,
and

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and stated that he wished to draw for the money. In answer to that letter *Gibbs*, on the 5th *February* 1820, sent him an account of the several receipts and payments since the pass-book had been last made up. In that account credit was given to the defendant for 1075*l.*, a year's annuity, due from Lord *Alvanley*, December 6th 1819; *Gibbs* at the same time informed the defendant that it had *not* been received, but that when it was the balance in his (defendant's) favour would be 1045*l.* On 15th *December*, *Gibbs* wrote to the defendant, and stated that he would honour his draft at seventy days' sight, but that he, *Gibbs*, had not received the money. On the 19th of *February* the defendant drew on *Gibbs*, at that date, for 1000*l.* On the 19th or 20th of *May*, the pass-book, not having been made up, since *May* 1819, was left with the bankrupts for that purpose, and the balance was then stated to be 749*l.* 9*s.* 5*d.* in favour of the defendant, which he drew for by a bill, which was afterwards paid on the 30th *June* 1820. The pass-book was soon afterwards returned to the defendant, with an entry, that 1075*l.*, Lord *Alvanley's* one year's annuity, due the 6th *December* 1819, was not then received. On the debit side of the account the defendant was charged with the bill for 1000*l.*, as paid on the 15th *May* 1820.

Besides the annuity granted to the defendant, Lord *Alvanley* had granted several others to persons for whom the bankrupts were agents, and Lord *Foley* was surety for the payment of them all. The bankrupts had also large bill transactions with Lord *Alvanley*, and on the 24th *October* 1820, Lord *Alvanley* was indebted to them in a sum of 30,691*l.* on the bill account. On the 31st *October* 1820 the bankrupts instructed an attorney to write to Lord *Alvanley* and Lord *Foley*, on behalf

behalf of six several annuitants, to whom the arrears then due amounted to about 9000*l.*, (of which 1881*l.* was due to the defendant on the 6th *September* 1820,) and to write as if employed by the annuitants, and not by them, *H.* and *G.* The attorney accordingly did write to them upon two different occasions, and on the 4th or 5th *November* was informed by *Gibbs* that he had received several sums of money from Lord *Alvanley* on account. On the 6th *November* the attorney had an interview with Lord *Foley* and Lord *Alvanley* together, and pressed them for further sums. Lord *Foley* appeared much hurt at being pressed, being only a surety. Lord *Alvanley* promised to provide a considerable sum of money, and on the following day he went with *Gibbs* to the chambers of the attorney, and said he was not fully prepared, but threw down bank notes amounting to 2800*l.* The attorney declined to receive the money, saying “*Gibbs* is the agent of these gentlemen to receive the money.” Lord *Alvanley* then paid the money to *Gibbs*, and promised to pay more in a few days; and the sums actually paid to the bankrupts by Lord *Alvanley* between the 1st and the 10th of *November*, amounted to 7146*l.* Between the 27th of *October* and the 10th of *November* bills to the amount of 9500*l.*, accepted by the bankrupts for Lord *Alvanley*, and for which he was to provide, became due. *Gibbs* applied the 7146*l.* paid by Lord *Alvanley* between the 1st and 10th *November*, in discharge of the bill account. The bankrupts, also, between the 30th *October* and the 10th *November* had paid, on account of Lord *Alvanley*, bills accepted by him to the amount of 10,500*l.*, and during the same period he drew bills upon them to the amount of 7000*l.*, all of which were afterwards paid. On the 25th of *November* 1820 the bankrupts wrote to Lord *Alvanley*, and enclosed him

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him a statement of an account, by which it appeared that he was indebted to them upwards of 40,000*l.*, and they added that that was besides and independent of all his, Lord *Alvanley's*, annuities, due since *December* 1818. On the same day Lord *Alvanley*, by letter, acknowledged the account to be correct, and stated that he was aware that the sums so advanced were independent of the arrears of the annuities since *December* 1818. If the sum of 7146*l.* was not to be considered as appropriated to the annuitants, for whom the attorney wrote, the bankrupts had paid to the defendant more than they had received on his account, and upon that sum they claimed interest from the time when it was advanced.

Hill for the plaintiffs. The assignees of *Howard* and *Gibbs* are entitled to recover back the sum of 1343*l.* which the bankrupts advanced to the defendant on account of the annuity granted by Lord *Alvanley*; for the defendant had notice from *Howard* and *Gibbs*, that they had not received the money at the time of the advance. That sum, therefore, is money advanced, and not a payment made by them to their principals; therefore as to that part of the case, the doctrine applicable to accounts rendered by agents to their principals, does not apply. It will be contended, that it must be inferred from the facts stated in this case, that the money paid by Lord *Alvanley*, after he had been pressed by the attorney, ought to be applied in discharge of the annuities then due from him; but as Lord *Alvanley* did not expressly appropriate the money at the time of payment, it was competent to *Howard* and *Gibbs* to apply it to the bill account, and they did so. Afterwards, in a letter to *Howard* and *Gibbs*, Lord *Al-*
vanley

vanley admitted the propriety of that application; and that is an express acknowledgment by him that he had appropriated all the payments to the bill account. But, assuming that the 7146*l.* was paid upon account of the annuities, the precise amount of them is not ascertained; how, then, can the Court apportion that sum among the different annuitants? Besides, some of the annuities may have been in arrear for a longer period than others, and in that case the sums paid ought to be appropriated in the first instance to discharge the oldest debt. Then, as to *Rowley's* annuity, the money was advanced by *Howard*, as trustee of the estate on which it had been secured. He paid more than the produce of that estate, and the grantor having become bankrupt before the trustee entered into the receipt of the profits of the estate, the defendant was no loser by not having the opportunity of applying to him personally.

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ABBOTT C. J. We are all of opinion that the plaintiff cannot substantiate any claim for interest. The general rule is, that interest is not due by law for money lent, unless from the usage of trade or the dealings between the parties, a contract for interest is to be implied. Here no such contract is to be implied, for there is no usage of trade; and it does not appear by the case that any interest had ever been brought into the account on either side; and there is an additional reason in this case, why the plaintiffs should not be allowed to charge interest upon the sum of 1000*l.*, because it is manifest that *Howard* and *Gibbs* allowed the defendant to draw for that sum, in order to keep him quiet, and prevent him from urging his claim upon Lord *Alvanley*. The advance, therefore, was made to
answer

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answer their own purposes; and we are clearly of opinion, that that claim cannot be sustained.

With respect to *Rowley's* annuity, if this was the case of a man giving credit by mistake, the mistake might, no doubt, be corrected, and the money paid in consequence of that mistake, might be recovered back, but that is not the present case. *Howard* and *Gibbs* with their eyes open, and knowing (as we must suppose) how much they had actually received out of the leasehold estate, and how much was applicable to the payment of that annuity, think fit from time to time, for a long period, to give credit to the general in his lifetime, and after his death to the defendant, for the whole of this money, as money received on their account. It was evidently important for *Howard* and *Gibbs*, with reference to the system on which they were then conducting their business, to make their customers believe that the annuities were duly paid; and they having thought fit to give credit for these sums to the grantees of these annuities, and induced them to treat them as money for which they had a right to draw, we think it would be most unjust to allow *Howard* and *Gibbs* (if they had not become bankrupts) or their assignees, who stand in the same situation, to say at last, that the grantees must refund all this money. We, therefore, think that the plaintiffs cannot recover back the sums which the bankrupts have paid to the defendant and his brother on account of that annuity.

The remaining point is as to Lord *Alvanley's* annuities. It appears that several sums of money were received by *Howard* and *Gibbs*, after their attorney had written a letter, addressed not merely to Lord *Alvanley* but to Lord *Foley*. The latter, therefore, may have a

right to insist that the money was paid in pursuance of that letter, and should be applied in discharge of those annuities for which he had become surety. The counsel for the defendant will, therefore, direct his attention to the question, whether any and what money was received by *Howard* and *Gibbs* in consequence of the attorney's application, made according to their instructions, and how that sum is to be apportioned.

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Evans for the defendant: *Howard* and *Gibbs* were agents both for the grantors and the grantees of these annuities, and if a party who is an agent for such persons, chooses to debit one and credit the other in account, and communicates to his principals that he has so done, he, the agent, must be bound by that act. In *Williamson v. Gould*, and *Carroll v. Gould (a)*, *Howard* and *Gibbs* paid the amount of the instalments without having received them, and charged their commission upon the same, and those were held to be voluntary payments on account of the annuities, and if so, they could not be recovered back when paid. The distinction between those cases and the present is, that here the bankrupts informed the grantee of the annuity, that they had not received the instalments, but they said they expected to receive them immediately, and they allowed him to draw for 1000*l.*; they ought to have communicated to the defendant afterwards, that they had not received the money, but they concealed this fact to answer their own purposes, and thereby became liable themselves; they were, therefore, guilty of negligence, and having induced the defendant to treat the

(a) 1 *Ding.* 191.

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money received on the bill as his own, they cannot now recover it back as if it had been a loan. In *Edgar v. Bumstead* (a), an insurance broker, after a loss had happened upon a policy which he had effected, paid the assured the full amount of the money subscribed; and it was held that he could not recover back any part of it, upon the ground that before the loss happened, one of the underwriters upon the policy had become insolvent, and that he was not aware of the fact when he paid the money. In *Simpson v. Swan* (b), a factor upon selling goods took a security payable to himself from the purchaser, and gave his own security to the principal for the nett proceeds, without disclosing the name of the purchaser, and it was held, that if the latter became insolvent before paying his security, the factor could not compel his principal to refund the money received by him as the price of the goods. Again, in this case Lord *Alvanley* paid the bankrupts a sum of 7146*l.* in consequence of the attorney's application to him and Lord *Foley*, which was made on account of the annuitants only. Lord *Foley* was a surety, and these payments having been made by Lord *Alvanley* in consequence of that application, must have been made on account of the annuities, and in order to discharge Lord *Foley*, the whole 7146*l.* was, therefore, applicable to discharge the 9000*l.*, and must be apportioned pro rata among the different persons to whom the annuities were due, and in whose behalf the application was made. In that case 1490*l.* must be applied to the payment of the 1881*l.* which was the proportion of the 9000*l.* due at that time from Lord

(a) 1 Camp. 411.

(b) 3 Camp. 291.

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Alvanley to the defendant, and that exceeds the sum now claimed by the plaintiffs.

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ABBOTT C. J. After the opinion which we have expressed upon the other points in this case, the only remaining question is, whether the bankrupts received from Lord *Alvanley* a sum equal to 1343*l.* which they ought to have applied to the defendant's account. The circumstances attending the bill of 1000*l.* have been relied upon by the defendant, and if the bankrupts are to be considered as having paid that sum as money received to the use of the defendant, and are not at liberty to call it back, it must be deducted from the 1343*l.* But it seems to me that if the case rested there, the defendant would have great difficulty in establishing his right to that sum, because at the same time when the defendant was informed that he might draw for 1000*l.* on the credit of the sums due from Lord *Alvanley*, he was also informed that those sums were not *then* received, and when the bill became due on the 15th of *May*, the defendant was again informed that the money due from Lord *Alvanley* had not been received. I have great difficulty, therefore, in saying that *Howard* and *Gibbs* are bound by that bill. But the case on behalf of the defendant as to this part of the case, assumes another shape. It appears, that on the 31st of *October*, *Gibbs* desired his attorney to write to Lord *Alvanley* and Lord *Foley*, who had become surety in several annuity transactions, to demand payment of the arrears of those annuities, but *Gibbs* desired that he would so write as to make it appear that he was writing, not at the instance of *Howard* and *Gibbs*, but at the instance of the annuitants themselves; and accordingly,

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at two different times, the attorney wrote letters to Lord *Alvanley* and Lord *Foley* upon the subject. The question is, whether the sums paid by Lord *Alvanley* after these letters had been written, are to be applied to the discharge of the annuities for which Lord *Foley* was a surety. *Gibbs* afterwards, on the 4th of *November*, told the attorney that he had received a sum of money from Lord *Alvanley*, but did not specify the amount. On the 6th the attorney had an interview with Lords *Alvanley* and *Foley*, and pressed them for further sums. Lord *Foley* appeared very much hurt at being pressed, and remonstrated with Lord *Alvanley*, who promised that he would pay the same afternoon a handsome sum. On the next day Lord *Alvanley* went to the chambers of the attorney, and threw down bank notes, which are ascertained now to have amounted to 2800*l*. The money was offered to the attorney, evidently as the agent of the annuitants on whose behalf he had written; but he declined to receive the money, and *Gibbs* did, in fact, receive it, and Lord *Alvanley* promised that he would pay some more money in a few days. On the 10th o. *November* he paid two sums of 500*l*., and between the 1st and the 10th of *November* he had altogether paid sums amounting to 7146*l*. It is contended on the part of the plaintiffs, that *Howard* and *Gibbs* had a right to apply these sums to the bill account, and, perhaps, as between them and Lord *Alvanley* they might be entitled so to do; but Lord *Foley* had a right to interfere, and say that they should not be so applied. They were obtained in consequence of the application to him; for it is plain that Lord *Alvanley*, in consequence of his remonstrances, paid the money in order to relieve Lord *Foley*. If the money was so paid Lord *Foley* was
thereby

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thereby discharged from his liability; and *Howard* and *Gibbs*, having suffered the annuitants to lose their remedy against the surety, are bound to apply the whole of the monies received to the payment of the arrears of those annuities. I am, therefore, of opinion, that the entire sums paid by Lord *Alvanley* between the 1st and 10th of *November* ought to be applied to the annuitants, on whose behalf the attorney had written to Lords *Alvanley* and *Foley*. Now the sums for which that application was made amounted to 9000*l.*, or thereabouts. The precise sum is not material, and suppose 7146*l.* to have been paid on account of the 9000*l.*, the proportion of the former sum which must be applicable to the payment of the sum of 1881*l.*, which was due to the defendant at the time when the attorney applied for payment, will be 1490*l.*, which exceeds the sum claimed by the plaintiffs. The consequence is, that there must be judgment for the defendant.

BAYLEY J. As to *Rowley's* annuity, I agree entirely with the opinion expressed by my Lord Chief Justice. It is quite clear, that if an agent (employed to receive money, and bound by his duty to his principal from time to time to communicate to him whether the money is received or not,) renders an account from time to time, which contains a statement that the money is received, he is bound by that account, unless he can shew that that statement was made unintentionally and by mistake. If he cannot shew that, he is not at liberty afterwards to say that the money had not been received, and never will be received, and to claim reimbursement in respect of those sums for which he had previously given credit. I think that when an agent has deliberately and intentionally communicated to a prin-

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cipal that the money due to him has been received, he makes the communication at his peril, and is not at liberty afterwards to recover the money back again. With respect to the sum claimed for interest upon the bill of 1000*l.*, it is quite clear that interest cannot be claimed for money lent, unless it appears by the usage of the trade, or by the dealings between the parties, that the intention was that interest should be given. Under the peculiar circumstances under which this money was advanced, I am satisfied that there never was any expectation on the part of the defendant, that he was to be liable to pay interest. The accommodation granted by *Howard* and *Gibbs* to the defendant, was to prevent that pressure upon Lord *Alvanley*, which would have made it difficult for *Howard* and *Gibbs* to hold him out as a person whose annuities were likely to be paid in future.

The learned judge then commented on the facts relating to the payment of the 714*l.* by Lord *Alvanley*, and argued that the parties must have understood that payment to have been made on account of the annuities for which Lord *Foley* was surety, and concluded by saying, that he was of opinion that the whole of that sum ought to be divided pro rata among the several annuitants on whose behalf the attorney had applied to Lord *Alvanley*. The consequence of that was, that a larger sum would be applicable to the payment of the sum then due to the defendant than the sum now claimed by the assignees; and that being so, the judgment must be for the defendant.

HOLROYD J. With respect to *Rowley's* annuity, the money was advanced by *Howard* and *Gibbs* to discharge it; but as that money is admitted to have been received
 by

by them on account of *Rowley's* annuity, I think we are bound to consider that account as closed, with respect to the defendant. In consequence of that account the defendant drew for sums which he thought he was entitled to receive. Assuming that they really had not received those sums, yet they held out that they had received them, and they voluntarily took upon themselves to give credit for the payment of those sums to another person. The defendant drew for them, not as sums advanced to him by way of loan, but as money represented by *Howard* and *Gibbs* to have been received by them to his use, or as money not received, but for which they had agreed to make themselves accountable. It appears to me that the payment of those sums by *Howard* and *Gibbs*, under such circumstances, did not constitute a loan of money to the defendant, nor was it money received to the use of the bankrupts, which the defendant is now bound to refund. (a) I think, for the reasons already given, that there was no well-founded claim for interest. I am also of opinion, that the different sums, amounting together to 7146*l.*, must be considered to have been paid on account of the annuities. Those sums were in fact obtained through the medium of the attorney; and whatever was obtained through that medium was clearly paid, not upon the bill account, but on account of the annuities.

LITLEDALE J. having been absent during part of the argument, gave no opinion.

Judgment for the defendant.

(a) See *Strying v. Greenwood*, ante, p. 281.

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Saturday,
November 19th.The KING against The Inhabitants of
WASHBROOK.

By a private inclosure act, commissioners were directed to fix and settle the boundaries of a parish, in a certain manner therein specified, and to advertise in a provincial newspaper a description of the boundaries so fixed and settled. The boundaries so fixed and settled were also to be inserted in the award of the commissioners, and to be final, binding, and conclusive. The commissioners having fixed and settled the boundaries in the mode specified, duly advertised a description of them; but the boundaries mentioned in the award varied from those which had been advertised: Held, that the commissioners had not pursued the authority given by that act, and that their award was not binding as to the boundaries of the parish.

UPON an appeal against an order of two justices for the removal of *Matthias Redgen* from the parish of *Washbrook* to the parish of *Irworth Thorpe*, in the county of *Suffolk*, the sessions quashed the order, subject to the opinion of this Court upon the following case: In the year 1818, the pauper was hired for a year by *Robert Burrows*, and duly served him for a year, living in a cottage which, before the act of parliament hereinafter mentioned, was situate in the parish of *Irworth Thorpe*. The parish of *Irworth Thorpe* adjoins the parish of *Honington*. By an act of parliament, 39 G. 3., entitled "An Act for dividing, allotting, and enclosing the common fields, half year or shack lands, common meadows, heaths, commonable lands, commons, and waste grounds within the parish of *Honington*, in the county of *Suffolk*," it was, as to the perambulation of the bounds of the said parish of *Honington*, enacted, "That the commissioners by the act appointed, at their first or second meeting to be holden after the passing of the act, shall fix and appoint some day or days for perambulating the boundaries of the said parish of *Honington*; and shall, at least eight days previous to the time so fixed and appointed for such perambulation, cause notice in writing to be given (in a certain mode specified by the act), and that after and in conformity with such notice, the said commissioners shall and they are hereby authorized and required to make such perambulation as aforesaid,

aforesaid, and thereby, and also by the examination of witnesses upon oath, if they shall think the same expedient and necessary, which oath any one of the commissioners is hereby empowered to administer, or by such other lawful ways and means as they shall think proper, to ascertain, fix, and settle, the said boundaries against the boundaries of the adjoining parishes, townships, or places, and to cause the same to be staked or marked out in such manner as they shall think fit. And the said commissioners shall, within one calendar month after they have ascertained, fixed, and settled the said boundaries, or within ten days previous to the next meeting of the said commissioners, cause a description thereof to be inserted in some provincial newspaper circulating in the vicinity; and the said boundaries so ascertained, fixed, and settled by the said commissioners as aforesaid, or as hereinafter mentioned, shall also be set forth and described in their award hereinafter directed to be made, and shall be final, binding, and conclusive upon and against all persons whomsoever." The act then contained directions for settling the boundaries by appeal or arbitration, if the determination of the commissioners should be objected to by any lord or lady of any adjoining manor, or any land-owner in *Honington*, or any adjoining parish. The steps required by the act to be taken by the commissioners previously to perambulating the boundaries were duly taken. On the 12th of *November* 1799, the commissioners went their perambulation, in which they took the cottage in question into the parish of *Honington*. They then examined witnesses and old maps. There was some dispute about the boundaries, whereupon the commissioners examined witnesses, and it appeared by their proceedings, that on
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matter within their jurisdiction, was held conclusive; and evidence tendered to contradict it was rejected. This award is clear and intelligible on the face of it, and the Court will presume that the commissioners acted correctly at the time of making it, according to the principle laid down in *Williams v. E. I. Company* (a), and recognised in *Rex v. Haslingfield*. (b) The award has remained undisputed for twenty-four years; after such a lapse of time every thing should be intended to support it. Case on the *Over-Kellet Inclosure* act. (c)

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Alderson and *Biggs Andrews* contra. By the act in question the commissioners were directed to ascertain, fix, and settle the boundaries, and insert a description of them in some provincial newspaper. And the boundaries so ascertained, fixed, and settled, were to be inserted in the award, and to be final and conclusive. The determination of the commissioners was that which they advertised, and that was to be final. The insertion of the description of the boundaries in the award was a mere ministerial act, and a mistake in that could not alter the previous determination of the commissioners.

ABBOTT C. J. The commissioners had a special power given to them by the inclosure act in question. They were to insert in their award that description of the boundaries which had been advertised, and then the award was to be final. They have not pursued that power; the award, therefore, as to the boundaries, cannot be final. It follows, then, that the pauper during his service with *Burrows*, slept in *Ixworth Thorpe*, and gained a settlement there.

Order of sessions quashed.

(a) 3 East, 192.

(b) 2 M. & S. 558.

(c) Tidd's Pr. 887.

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Tuesday,
November 22d.

BARROW and Another *against* BELL.

Where, in assumption on a policy of insurance on goods warranted free from average, unless the ship were stranded, it appeared that in the course of the voyage the ship was, by tempestuous weather, forced to take shelter in a harbour, and in entering it, struck upon an anchor, and being brought to her moorings, was found leaky and in danger of sinking, and on that account was hauled with warps higher up the harbour, where she took the ground and remained fast there for half an hour: Held, that this was a stranding within the meaning of the policy.

ASSUMPSIT on a policy of insurance on goods warranted free from average, unless general, or the ship should be stranded. The first count of the declaration stated all the circumstances specially. The second was general, and alleged a stranding. Plea, the general issue. At the trial before *Littledale J.*, at the *London* sittings after last *Michaelmas* term, a verdict was found for the plaintiffs; subject to the opinion of this Court upon the following case. The plaintiffs, who are merchants at *Manchester*, on the 18th of *November* 1822, caused to be effected a policy of insurance on the *Latona*, at and from *Liverpool* to *Gibraltar*, on goods which were warranted free from average, unless general, or the ship should be stranded. The goods insured were subsequently declared to be manufactured cottons, and valued at the sum of 5000*l.* by an indorsement upon the policy. The defendant subscribed the policy of insurance for 200*l.* The plaintiffs were interested to the full amount of the sum insured. On the 11th of *December* the *Latona* set sail with the goods insured on board, on her voyage from *Liverpool* to *Gibraltar*. On the 15th of *December* she was compelled by contrary winds and tempestuous weather, to bear away for *Holyhead*. Between eight and nine in the afternoon she took on board a pilot in *Holyhead Bay*, who piloted her into the harbour, which was thickly crowded with shipping, and whilst entering she was observed by some of the crew on board to have struck upon something, but her

her progress was not thereby retarded. She was moored under the directions of the pilot, about the middle of the harbour, and in about fourteen feet water. The pilot immediately went on shore, but had scarcely quitted the ship before it was discovered that she had sprung a leak, and he had been but a few minutes on shore when the captain came to him, and informed him the vessel was sinking. Every exertion was used at the pumps by those on board, and the pilot and captain immediately returned and brought with them four men and a bont. They found four feet water in the hold, and rigged both pumps. Had the vessel remained at her moorings she must have sunk. The cable was slipped for expedition, and the ship was warped further up the harbour, towards the east end of the custom-house quay. No sails were put up, as the wind was blowing contrary to the direction in which the ship was hauled. By means of the warps, the ship was drawn upon the ground, which was at a place about a quarter of a mile from where she had been moored. She could not be got nearer to the quay than within about seven or eight yards distance from the east corner of it. This took place between nine and ten o'clock, and the tide was highest between eleven and twelve. The *Latona* lay for half an hour upon the ground, and was then as the tide rose hauled nearer to the quay, and ultimately alongside the east end of it, as high up as the steps leading on to the quay would allow. About one o'clock on the following morning the tide left her upon the ground, and she was then pumped dry and the leak fastened by a carpenter, who came on board for that tide. On the following tide the vessel was taken alongside the west side of the quay, where the vessels usually discharge.

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charge. The cargo was there unladen and examined. The leak, which proved to be on the larboard side, just under the run, and to have been caused by the vessel striking upon the fluke of an anchor in coming into the harbour, was afterwards completely repaired, and the cargo reladen, and after the space of a fortnight she returned to her original moorings, in the middle of the harbour. The vessel would draw eight or nine feet of water, and in the place where she was first moored, there would at the height of the tide be upwards of fourteen feet, but at low water in that place there would not be more than from one to two feet. At the entrance of the harbour there is at low water about seventeen feet, and it grows gradually less higher up the harbour, until it becomes quite dry. The ships in the harbour generally lie afloat, both at the flood and ebb tide, but when the harbour is much crowded, as was the case when the *Latona* entered, they are obliged to be carried so high up as to be dry and lie on the mud when the tide is out. The *Latona* proceeded upon her voyage again on the 28th of *December*, and reached her ultimate destination at *Gibraltar* with the goods insured on board, on the 12th *February* 1823. The goods insured were damaged by the injury sustained, to the amount of 11*l.* 3*s.* 6*d.* per cent. on the defendant's subscription to the policy.

Campbell for the plaintiffs. This was a clear case of stranding. The ship by stress of weather was forced into a port, when brought to her moorings she was found to be in a sinking state, and was in consequence drawn upon the ground, where she remained half an hour. It is no answer to say that this was done on purpose,

purpose, and that the injury to the cargo did not result from the stranding, *Burnett v. Kensington* (a), *Harman v. Vaux*. (b) Thus, where a ship had run upon some wooden piles in a river, and remained fast there until the piles were cut away, it was held to be a stranding, *Dobson v. Bolton*. (c) If, indeed, the ship had taken the ground in the ordinary course of navigation, the case might have been different, *Hearne v. Edmonds*. (d) But that case is expressly distinguished by the court from *Carruthers v. Sydebotham* (e), where a pilot had improperly moored a vessel close to a dock-gate in the *Mersey*, and when the tide fell she took the ground and was damaged, and it was held to be a stranding; the ship having been taken out of the usual course, and improperly moored in the place where the accident afterwards happened. The same distinction is recognised in *Rayner v. Godmond*. (f) The case of *Baring v. Henkle* (g), may be relied on for the defendant: there a vessel in the river *Thames* was run foul of by two other vessels, and thereby driven ashore, where she remained fast for an hour, and it was held not to be a stranding. But the law of that case is very doubtful, and it is distinguishable from this, for here the stranding was for the purpose of avoiding a greater impending danger.

F. Pollock for the defendant. There was not in this case a stranding within the meaning of the policy. In *Burnett v. Kensington*, and *Harman v. Vaux*, there was an undoubted stranding, but this was a mere removal from one part of the harbour to another. In *Carruthers v. Sydebotham*,

(a) 7 T. R. 210.

(b) 5 Campb. 429.

(c) *Marsh Ins.* 231., *Park Ins.* 177. S. C.

(d) 1 B. & B. 398.

(e) 4 M. & S. 77. (f) 5 B. & A. 225.

(g) *Marsh Ins.* 232.

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and *Rayner v. Godmond*, the injury sustained was occasioned by the stranding. [*Littleale J.* In point of law that makes no difference.] That is so, but such a circumstance would make the court anxious to extend the meaning of the word *stranding* as far as possible. Suppose the captain instead of drawing the ship ashore for the purpose of repairing her, had taken her into dock, she would then, on the falling of the tide, have touched and remained upon the ground, yet that would not have been a stranding. And it seems difficult to distinguish taking the ground under such circumstances, from that which actually happened in this case. Again, *Baring v. Henkle* is an authority in favour of the defendant: there the taking the ground did not happen in the course of the voyage, and it was held not to be a stranding: here the injury sustained in the course of the voyage was the striking upon an anchor; the vessel was afterwards moored in deep water. The subsequent act of hauling her ashore was not in the course of her voyage, and the underwriters ought not to be made answerable for it.

ABBOTT C. J. I am of opinion that the ship was stranded within the meaning of this policy. The distinction taken in the cases cited on behalf of the plaintiff, appears to me to be a very sound distinction. What, then, are the facts of this case? A ship driven into a harbour by stress of weather, on entering that harbour meets with an accident, and being moored in deep water, is in danger of sinking. For this reason she is drawn into another part of the harbour, where she immediately takes the ground, and remains fast for some time. I cannot distinguish this from the case of a ship

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on the high seas, in danger of being wrecked by a storm, and on that account allowed to be driven by the sails and rudder upon the beach of the main ocean.

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BAYLEY J. The ship in this case was laid on the strand, not in the ordinary course of navigation, but, ex necessitate, to avoid an impending danger. It is, therefore, clearly within *Burnett v. Kensington*, and the plaintiff is entitled to recover for the damage sustained by his goods.

HOLROYD and LITLEDALE Js. concurred.

Postea to the Plaintiff (a)

(a) *Quære*, Whether this would have been a loss by perils of the sea, if the injury to the goods had resulted from the stranding and not from striking upon an anchor. See *Thompson v. Whitmore*, 3 Taunt. 227.; *Fletcher v. Inglis*, 2 B. & A. 315.; *Phillips v. Barker*, 5 B. & A. 161.

THOMAS SNELL against JOHN SNELL and ROBERT
HEARD.

Tuesday,
November 22d.

COVENANT against the defendants, for not having delivered sufficient timber for the repairs of certain messuages, tenements, mills, and premises, situate in the parish of *Beaford*, in the county of *Devon*.

Where, in covenant, a defendant craves oyer of the deed, sets it out, and pleads non est factum, the deed so set out

becomes a part of the declaration, and the only question at the trial upon that issue is, whether the deed set out was executed by the defendant.

Covenant to deliver timber (growing on the premises) sufficient for the repairs thereof; averment, that there was timber growing on the premises sufficient for the repairs, but defendant had not delivered it. Plea, that there was not timber growing on the premises sufficient and proper for the repairs. Issue thereon. Semble, that the covenant meant that the timber should be sufficient in quality as well as quantity, and that the plea was good, (not having been demurred to,) without stating that there was not timber sufficient for any part of the repairs.

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At the trial before *Abbott C. J.*, at the Summer assizes 1824, for the county of *Devon*, a verdict for 3000*l.* was found for the plaintiff, subject to the award of an arbitrator, and subject to the opinion of this Court upon the following case: *Jonathan Ivie*, by a certain indenture of lease, bearing date the 10th day of *April* 1775, and made between *J. Ivie* of the one part, and one *Anthony Snell* of the other part, demised for the term of four-score and nineteen years, thenceforth next ensuing, certain messuages, gardens, &c., and all those two water grist mills, and mill-houses, with the appurtenances, called *Beaford Mills*, together with all those head-wears, mill-pools, &c.; and also all that coppice known by the name of *Beaford Wood*, with the appurtenances, (excepting unto the said *Jonathan Ivie*, his heirs and assigns, all timber and timber-like trees and saplings of oak, ash, elm, and beech then growing, or thereafter to grow on the said premises, or any part thereof, with free liberty of ingress and egress for the said *Jonathan Ivie*, his heirs and assigns, agents, workmen, and servants, at all times to view, fell, work up, and carry away the same, during the term thereby granted;) and the said wood called *Beaford Wood* to be kept for wood and timber as formerly, except two acres to be grubbed up, and certain parts in the occupation of *William Heard*. And the said *Anthony Snell* did, by the said lease, for himself, his executors, &c., covenant, promise, and grant, to and with the said *Jonathan Ivie*, his heirs and assigns, that he the said *Anthony Snell*, his executors, &c., should and would, at his and their own proper cost and charges, repair and amend, and keep in good and sufficient repair, as well the said mills, mill-houses, flood-hatches, mill-leats, and head-wears, so as the two
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water grist-mills, mill-house, mill-leat, and head-wears, and all other things belonging to them, might be kept as large, strong, and useful in every respect, as they at any time had formerly been; and being so kept in good and sufficient repair, he the said *Anthony Snell*, his executors, &c., should and would likewise, at his and their own proper costs and charges, well and sufficiently uphold, sustain, and maintain all and singular the said demised premises, with the appurtenances, as well houses, walls, and coverings, as the said two mills and wears, and all hedges, ditches, gates, bars, stiles, and fences, with all needful and necessary reparations and amendments whatsoever, when and as often as need should require, during the said term, and the same mills, wears, leat, hatches, and all other the premises, with the appurtenances, so well and sufficiently repaired, sustained, upholden, maintained, and amended at the end of the said term, should and would leave and yield up the same, *the said Anthony Snell, his executors, administrators, and assigns, having and taking, by delivery of the said Jonathan Ivie, his heirs or assigns, steward or agent, sufficient timber growing on the premises, for repairing the said messuages, tenements, mills, and premises, during the said term.*" In pursuance of the said lease, *A. Snell* entered upon and took possession of the demised premises. The plaintiff is assignee of the lease, and is in possession of the demised premises. The defendants are the assignees of the reversion. The demised premises requiring repair, the plaintiff demanded of the defendants sufficient timber, growing on the premises, to be delivered to him for repairing; and the defendants having neglected to furnish the same, the plaintiff brought his action to recover in

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damages for breach of covenant under these circumstances. The declaration stated that "*Jonathan Ivie*, by indenture of 10th of *April* 1775, did demise to *Anthony Snell* certain messuages, tenements, mills, and premises (except as in the said indenture excepted), and that *A. Snell* did in and by the said indenture for himself, his executors, &c. covenant, promise, and grant to and with the said *Jonathan Ivie*, his heirs and assigns, that he, the said *Anthony Snell*, his executors, &c. should and would, at his and their own proper costs and charges, repair and amend, and keep in good and sufficient repair, the said messuages, tenements, mills, and premises; and being so kept in good and sufficient repair, he, his executors, &c. should and would likewise, at his and their own proper costs and charges, well and sufficiently uphold, sustain, and maintain the said messuages, tenements, mills, and premises. And the said *Jonathan Ivie* did in and by the said indenture, for himself, his heirs, and assigns, covenant, promise, and agree to and with *A. Snell*, his executors, &c. that he, the said *Jonathan Ivie*, his heirs or assigns, steward or agent, would deliver sufficient timber, growing on the premises, to repair the said messuages, tenements, mills, and premises during the said term." And subsequently having stated a demand and request that the said defendants would deliver sufficient timber, growing on the demised premises, for completing the repairs, the declaration averred notice given to the defendants that he, the plaintiff, was ready and willing, and that it was his intention to do and complete such repairs so soon as timber should be delivered to him for that purpose; and averred that timber sufficient for such repairs was growing on the demised premises. The defendant, after
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craving oyer, and setting out the indenture, pleaded, first, non est factum; secondly, that the timber growing on the premises was not proper or sufficient to repair them, as stated in the declaration; on which pleas issues were joined; and at the trial the plaintiff's counsel contended that the defendants, by setting out the deed on oyer, and pleading non est factum, admitted the words of the deed, "the said *Anthony Snell*, his executors, &c. having and taking by the delivery of the said *Jonathan Ivie*, his heirs or assigns, steward or agent, sufficient timber, growing on the premises, for repairing the said messuages, tenements, mills, and premises, during the said term," to amount to a covenant; and that the defendants on such pleading were entitled to object only any variance (if any) between the covenant set out in the declaration and the covenant admitted by the defendant's pleading to be contained in the indenture of lease; and also that the plea of the defendants that the timber growing on the premises was not sufficient or proper to repair them, admitted the fact that timber was growing on the premises; and as no kind of timber was excepted by the indenture, that all timber was proper; and that on those issues the plaintiff must have a verdict, the quantum of damages on those issues being the only fact to be ascertained. On the other hand, the counsel for the defendant contended that those words in the lease did not amount to any covenant on the part of the lessor to provide timber for the repairs; and if not, that the defendants were entitled to a verdict on their plea of non est factum; and however that might be, they were entitled to contend on that plea, that the lease was not correctly set out in the declaration, inasmuch as the declaration represented the stipulation on the part of the

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lessor as an absolute and independent covenant, and not as a mutual condition or covenant to be performed at the same time with that of the lessee; and it appeared by the declaration, that the lessor was to deliver timber growing on the premises generally, but by the lease, although the whole of *Beaford* wood was demised, two acres of it were to be grubbed up, and the rest of the wood only kept for timber as formerly. The defendants' counsel also contended, that even if there were some timber growing on the premises, yet if it was not proper or sufficient for the requisite repairs, the defendants would be entitled to a verdict on the other issue. Whereupon these questions of law were agreed to be made the subject of a special case, and the questions of fact (subject to the opinion of the Court upon the law) and damages thereupon were referred to arbitration. The questions for the opinion of the Court were, first, whether the words, "the said *Anthony Snell*, his executors, administrators, and assigns, having and taking by the delivery of the said *Jonathan Ivie*, his heirs or assigns, steward or agent, sufficient timber growing on the premises for repairing the said messuages, tenements, mills, and premises during the said term," amount to a covenant on the part of the lessor, or only a condition or qualification of the lessee's covenant to repair; and whether, in the latter case, the defendants were or were not entitled to a verdict on their plea of *non est factum* on that ground. Secondly, whether the indenture was correctly set out in the declaration; and if not, whether the defendants were or were not entitled to the verdict on that plea on that ground. And, thirdly, whether the defendants were or were not entitled to the verdict on the other issue, in case the arbitrator should

should find that there was some timber growing on the premises, but that the same was not proper or sufficient for the repairs.

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Carter, for the plaintiff. The question as to the construction of the alleged covenant cannot arise in this case, the defendant having set out the deed on oyer, and pleaded non est factum. [*Abbott C. J.* The deed so set out becomes a part of the declaration; the defendants, in order to raise that question, should have demurred.] Then, secondly, the plaintiff having averred that timber sufficient for the repairs was growing on the demised premises, and the defendants having pleaded that the timber there growing was not proper or sufficient for the repairs, without adding, *or any part thereof*, it is admitted on the record that there was some timber which could be applied to the repairs, and the word *proper* is not found in the covenant. The plaintiff is, therefore, at all events, entitled to a verdict upon that issue, and the arbitrator has nothing to do but enquire into the amount of damages.

E. Lawes, contra. The deed in question does not contain any covenant by the lessor to deliver timber. The lessee first covenants to repair during the term, and at the expiration thereof to deliver up the premises so repaired, "the said *A. Snell*, his executors, &c. having and taking by delivery of the said *Jonathan Ivie*, his heirs or assigns, steward or agent, sufficient timber growing on the premises for repairing the said messuages," &c. That is a mere qualification of the lessee's covenant to repair. In the case of *Holder v. Tayloe* (*a*)

(a) *Roll. Abr. Cov.* (C), pl. 3.

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it is said, "If a lessee covenant to repair, *provided always that the lessor shall find great timber*," this proviso shall not be a covenant on the part of the lessor, but shall be only a qualification of the covenant of the lessee. And *Dyer*, 19 b. pl. 115., shows that the lessee might, in this case, have taken timber without waiting for a delivery by the lessor: the words, then, upon which reliance is placed, do not amount to a covenant; and if so, there is no such deed as that declared upon, and *Ross v. Parker* (a), and *Waugh v. Bussell* (b), show that the proper mode of taking advantage of such a variance is by pleading non est factum. [Abbott C. J. In *Waugh v. Bussell*, Gibbs C. J. says, "After oyer and non est factum pleaded, the question is, whether the tenor set out is the same as the tenor of the bond executed."] The covenant declared upon is described as an independent unconditional covenant; whereas, in truth, it is merely a qualification of the lessee's covenant, or, at all events, a dependent and mutual covenant; the declaration is therefore bad, and the defendants are entitled to take advantage of the variance on non est factum, *Tempany v. Burnand*. (c)

ABBOTT C. J. I abstain from giving any opinion upon the question of law as to the construction of the deed; that is, whether it contains a covenant on the part of the lessor to find timber for the repairs of the demised premises. The course of pleading which has been adopted precludes the Court from entering into or deciding that question. The plaintiff by his declaration surmises that there is such a covenant in the

(a) 1 B. & C. 358.

(b) 5 Taunt. 707.

(c) 4 Campb. 20.

lease,

lease, the defendant prays oyer, and having set it out, pleads non est factum. When that has been done, it appears by all the authorities that the only question is, whether the party did or did not execute the deed so set out and transcribed into the record, whereby it is rendered a part of the declaration. The second question arises upon a plea which is certainly informal. It should have stated that there was not timber growing on the premises sufficient for the repairs or any part thereof. But as the plaintiff has not demurred, it may perhaps be good. The word *sufficient* appears to embody *proper*; to be within the meaning of the covenant, the timber should be sufficient in quality as well as quantity, nothing therefore turns upon the introduction of the word *proper* into the plea. Besides, no question of this sort was raised at the trial; it was agreed to refer it to an arbitrator, and our duty is merely to instruct him as to the course which he ought to pursue. I take it to be this, if he finds that there was timber growing on the premises sufficient for all the repairs, he will give damages accordingly, and so in proportion if there was sufficient for a part only of the repairs. But if there was not timber sufficient for any repairs, he should on that issue direct a verdict to be entered for the defendants; and if the defendants are dissatisfied with the construction which the plaintiff has in his declaration put upon the covenant, they may bring a writ of error.

BAYLEY J. I am of the same opinion. If a plaintiff states the legal effect of a deed, the defendant has a right to see it on oyer, and if the meaning varies from that attributed to it in the declaration, in order to take advantage of that variance, he should plead non est factum

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factum without setting out the deed. If it does not support the breach, he should set it out and demur. If, however, he sets out the deed on oyer, and pleads non est factum, the only question at the trial of that issue is, whether the deed, whereof the tenor is set out, was executed by the defendant or not. That is the language of Gibbs C. J. in *Waugh v. Bussell*. If after a deed has been set out on oyer, a plea of non est factum could put in issue the legal effect ascribed to the deed in the declaration, and not merely the existence of the deed set out on oyer, it would be sending to the jury, not so properly a question of fact, as the question of law, what is the construction and legal effect of the deed. Upon the other point I agree in thinking, that the plea is informal, but as the plaintiff has not demurred, the arbitrator may take the justice of the case into consideration, and decide upon the facts according to the directions given by my Lord Chief Justice.

HOLROYD and LITTLEDALE Js. concurred.

Postea to the plaintiff

Wednesday,
 November 23d.

The KING against CHURCHILL and BOOTH.

The burgesses of Nottingham, and the occupiers of ancient messuages there, had as such, for a certain portion of the year, a right to turn cattle into certain fields, and to exclude, during that period, the owner of the soil: Held, that this was a mere right of common, and not rateable to the relief of the poor.

CHURCHILL and Booth appealed against a poor-rate for the town and county of the town of Nottingham, on two grounds; first, that they were improperly rated for certain lands of which they were not occupiers; and, secondly, that other persons who were occupiers

occupiers of land were not included in the rate. The sessions amended the rate, by striking out the names of the appellants from the rate in respect of the land for which they were respectively rated; and as to all other persons named therein they confirmed the rate, subject to the opinion of this Court upon the following case. The town and county of the town of *Nottingham* consists of the three parishes of *Saint Mary, Saint Peter, and Saint Nicholas*. In the parish of *Saint Mary* there are large fields or tracts of land, called the Sand Field, the Clay Field, and the Meadows, belonging to different persons. The land called the Meadows consists of about 280 acres, to the pasturage and herbage of which the burgesses, resident in the said three parishes, even if they are inmates, not renting or holding any tenement or hereditament whatever, are exclusively entitled; and to turn in three head of large cattle each from *Old Midsummer-day* to *Old Lammas-day*, when all the cattle are taken out, and the pasturage is laid till the third of *October*, when the said burgesses are again exclusively entitled to turn in a like number of cattle until the 2d of *February* following, which pasturage and herbage is of the value of 10s. per acre between *Old Midsummer* and *Candlemas*. The quantity of land in the sand and clay fields comprises about 650 acres, fenced off into different sized closes belonging to different individuals. The said burgesses, resident in the said three parishes, and also the occupiers of ancient messuages in the said three parishes, and who as such occupiers are severally rated to the poor in their respective parishes in respect of their messuages and other property, but not for such common right, claim, and such of them as choose, exercise the right to turn in three head of large cattle from *Old Lammas-day* to *Old Martinmas-day* in every year,

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year, during which period neither the owner of the freehold nor the tenants have, as such, any right to turn in cattle therein; and during that period the pasturage and herbage of the said fields are also of the value of 10s. per acre. The several persons named in the notice of appeal, and who have been duly served with the same, had each of them cattle, some three, some two, and some one, in either the fields or meadows, during some part of the time the same were commonable, and at the time of making the said rate; but none of such several persons were included in the said rate for so depasturing their cattle, nor has it ever been usual in the said parish of *Saint Mary* to rate the persons turning into the fields and meadows during the time of their so being open; and the court of sessions refused to quash or amend the rate, on account of such burgesses and occupiers of ancient messuages being omitted to be rated, from the impossibility of ascertaining and rating the whole of such persons so turning into the said fields and meadows, for their actual occupation and enjoyment, there being upwards of two thousand burgesses entitled so to turn in, besides the occupiers of many hundred messuages, many of whom exercise such rights in different modes and at different times, as by turning in one or more head of cattle for a night, or a day, and in other ways, and there being no coin small enough to assess some of them if they were liable to be rated only for their actual occupation and enjoyment.

Scarlett and *S. Phillipps*, in support of the order of sessions. The justices at sessions having amended the rate by striking out the names of the two appellants, they were no longer aggrieved by the rate, and had no right to insist upon the other objection, viz. that certain persons

persons had been improperly omitted. But that objection to the rate is clearly invalid. Upon the case it appears, that the burgesses and the occupiers of ancient houses, about 2000 in number, have an exclusive right of pasturage in three parcels of land during a certain portion of the year. That is a mere right of common, and not an occupation: the parties exercising it were not therefore liable to be rated, *Rex v. Bailiffs of Tewksbury* (a), *Rex v. Bailiffs, &c. of Sudbury*. (b) If the fields are vested in the corporation for the benefit of the burgesses, the corporation should be rated.

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Nolan and Balguy, contra. There is no weight in the preliminary objection. The appellants were only exonerated in respect of the land for which they were rated, and might be still aggrieved by the rate. As to the other and main point, the rate was defective. This occupation does not at all resemble agistment, for there the party takes a certain definite portion of the herbage, and pays an immediate profit to the paramount occupier. But these persons have, for a long period, the exclusive occupation, and if they are not rateable, no one else is. The cases which have been cited do not apply, for there it was found that the corporation were the occupiers. Here it is found that the burgesses were in the occupation of something producing benefit to them, they were therefore rateable. It is not necessary to enquire into their title, it is sufficient that they occupied; and upon the facts found, they were occupiers. The case of *Rex v. Watson* (c) is an authority

(a) 13 East, 155.

(b) 1 B. & C. 389.

(c) 5 East, 481.

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for these appellants. In *Rex v. Sudbury, Bayley J.* pointed out two circumstances which distinguished that case from *Rex v. Watson*, viz. that in the latter the individuals who turned on had the exclusive enjoyment of the land for the purpose of turning on their cattle, and that no payment was made by them to the corporation. The same distinctions exist between this case and *Rex v. Sudbury*, it cannot, therefore, be governed by it.

BAYLEY J. (a) In order to prove a person liable to be rated, it is necessary to show that he is an inhabitant or an occupier of lands, houses, &c. The question here is, whether the persons whose names are alleged to have been improperly omitted out of the rate were individually occupiers of land. The word *common* is well known to the law, and Lord Coke says there are four kinds of common of pasture; common appendant, which is appendant to arable land; common appurtenant, for which one must prescribe (in a free estate); common per cause de vicinage, which is but an excuse for trespass; and *common in gross*, which is so called, for that it appertaineth to no land, and must be by writing or prescription. Land lies in livery, but a right of common in grant. Does that for which it is attempted to rate the burgesses of *Nottingham* lie in grant or in livery? Each has a right to turn three cattle upon certain fields during a certain portion of the year. It is claimed by them as burgesses, and as occupiers of ancient houses. Could they be enfeoffed of such a privilege?

(a) Abbott C. J. was absent.

If

If not, it is plain that they have no right to the soil, but merely an incorporeal hereditament, a right of common by prescription, which is not rateable. The order of sessions was therefore right.

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HOLROYD J. I think that the burgesses cannot be rated in respect of their right to turn cattle upon the lands in question. It appears to me that the right is vested in the corporation, for the benefit of its members. A profit à prendre in the soil of another cannot be claimed by custom, except in the case of a copyhold or tenant right, where it is claimed in the soil of the lord. (a) In other cases it can only be claimed by grant or prescription. Now the burgesses in this case cannot take as a corporation, and cannot prescribe for the right in themselves, according to the case of *Mellor v. Spateman*. (b) Supposing, therefore, that there was a possession in law of those fields, so that trespass might have been maintained either by the corporation or the burgesses, I think it must have been by the corporation. (c) But this appears to me a mere incorporeal right, and not within any of the words in the statute 43 *Eliz. c. 2*. Land to which a right of common is attached may on that account be rated at a higher value, but the right of common is not rateable per se.

LITLEDALE J. I think that the burgesses could not as individuals be rated. They had a mere right of

(a) See *Foiston v. Crachroode*, 4 Co. 31 a.

(b) 1 *Saund.* 339.

(c) In *Com. Dig., Common* (H), it is said that a commoner cannot maintain trespass for damage to the soil or grass; for he has no interest but to take the pasture by the mouths of his cattle.

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common, and according to the decided cases that is not the subject of rating. It is said, that the exclusive pasturage gave them the exclusive interest. I think it had not that effect, and that they could not maintain trespass as persons having the *primam vesturam*. The right enjoyed by these burgesses could only be claimed by prescription in the name of the corporation. According to *Com. Dig. Prescription* (H), there may be a prescription for sole and several pasture, so as to exclude the owner of the soil, as appears also by *Hoskins v. Robins* (a); and under such circumstances the persons enjoying the right may grant it to others. But in this case no such grant to others could be made by the burgesses: the exclusive right was in the corporation, and they had it but for a limited time, and could only take it by grant or prescription. The burgesses could not take it by either of those modes; which shows that they had a mere privilege of turning on cattle, in respect of which they were not rateable. The order of sessions must, therefore, be confirmed.

Order of sessions confirmed.

(a) 2 *Saund.* 324.; and see *Potter v. North*, 1 *Saund.* 353. n. (2).

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November 23d.

UPON an appeal by the churchwardens and overseers of the poor of the parish of *Llanerchymedd*, in the county of *Anglesey*, against an order of two justices, for the removal of *John Owen*, shoemaker, his wife and family, from the parish of *Amlwch*, in the county of *Anglesey*, to the parish of *Llanerchymedd*, in the same county; the sessions quashed the order, subject to the opinion of this Court on the following case: In April 1824 overseers were appointed for the parish of *Llanerchymedd*. The order of removal was directed to the churchwardens and overseers of the parish of *Llanerchymedd*. To this it was objected that *Llanerchymedd* was not a parish. The court of great sessions directed the order to be amended in this respect, and the appellants denied their right to do so, which forms the first point in this case. If they had that power the case stands as if the removal had been to the parish or vill of *Llanerchymedd*.

The market town or village of *Llanerchymedd* lies partly in the parish of *Amlwch* (the church of which is five or six miles distant) partly in two other parishes and partly in the vill of *Llanerchymedd*, to which place this removal is made. The vill of *Llanerchymedd* lies in the middle of the village, and consists of a small plot of land, the property of the parson, on which stand the whole of the church and church-yard. There are also within it twelve or fifteen houses, and a few acres of land. It has of late maintained its own poor, and the inhabitants

An order of removal was directed to the churchwardens and overseers of the parish of *L.* In fact *L.* was a vill, and there were no churchwardens in it: Held, that the word "churchwardens" might be rejected as surplusage, and that the sessions might, under the stat. 5 G. 2. c. 119. s. 1., amend the order by inserting in it the words "or vill."

A party, by serving an office of clerk to a chapel situated in an extra parochial vill, may gain a settlement in the adjoining parish if he reside there, and if part of the duties of his office of clerk be exercisable within that part of the parish where he resides.

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have been assessed to the land-tax, as in the hamlet of *Bryngwallen*, which is in the parish of *Ceidio*. No churchwardens were ever known to be appointed, and no evidence was given of the appointment of a constable, although it appeared that the pauper's father had been seen acting as one for several years. The church or chapel of *Llanerchymedd* is kept in repair of right, one side thereof by the family who own the *Llwydiarth* estate, and the other side by the family who own the *Chrodden Issa* estate. That part of the village which is in the parish of *Amlwch* is all on the *Llwydiarth* estate, as are also the hall, and several farms in the vicinity. The chapelry of *Llanerchymedd* is attached to the rectory of *Llanbenllyn* (in the presentation of the Lord Bishop of *Bangor*) the parson of which receives the rents of the glebe lands in and near the vill of *Llanerchymedd*, appoints the curate, and pays his salary. The emoluments of the curate arise partly from his salary and partly from offerings and oblations, and other payments termed surplice fees. The inhabitants of the vill have no private sitting places in the church; all those on the south side belong to the *Chrodden Issa* estate; those on the north side belong to the *Llwydiarth* estate, which is in the parish of *Amlwch*, and the chief part of the congregation are dwellers on that estate. A proportion of the elements used at the administration of the sacrament at *Llanerchymedd* church is supplied by *Amlwch*. The clerk and sexton of *Llanerchymedd* appears to have been appointed by the *Llwydiarth* family (malgré the minister); his emoluments arise from sweeping the church and washing the surplices, which are not paid by the inhabitants of the vill, and also from offerings and other fees pertaining

pertaining to his office. John Owen, the pauper, was appointed clerk and sexton of *Llanerchymedd*, in March 1795, and he has executed the office to the present time, dwelling altogether in that part of the village of *Llanerchymedd*, which lies in the parish of *Amlwch*. The pauper's father was clearly settled in the vill of *Llanerchymedd*. The respondents insisted that the pauper gained no settlement in *Amlwch* by holding the office of clerk of *Llanerchymedd* as aforesaid, the duties of which they contended were of right only performed in the vill, and no part thereof in *Amlwch*. On the part of the appellants it was insisted, that it was the duty of the minister of *Llanerchymedd* to perform domestic service of the liturgy at the house of those inhabitants of the village and its vicinity who dwelt in the parish of *Amlwch*, and that it was the duty of the clerk to attend him. The respondents called as a witness, the Rev. — Lewis, who had been curate of *Llanerchymedd* for about sixteen years. The appellants called the Rev. — Richards, who had been curate since 1798; they also called the pauper, John Owen, who had been clerk for thirty years, and whose father had been clerk for a great many years before. It appeared from the testimony of all the witnesses, that it had been the uniform practice of the minister of *Llanerchymedd* to attend with his clerk at the houses of the inhabitants of *Amlwch*, in the village and its vicinity, for the purpose of visiting the sick, administering private baptism, and reading a prayer prior to the removal of bodies that were about to be buried at *Llanerchymedd* church. No limits were assigned as to the distance from the village within which these several services had been performed by the minister and clerk of *Llanerchymedd*. No marriages of the in-

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habitants have been solemnized in *Llanerchymedd*. The witnesses differed in opinion, whether these services, rendered to the inhabitants of *Amlwch* by the minister and clerk, were rendered as a matter of right or of indulgence. The sessions were of opinion that the pauper had held an annual office, a part of the duties of which were performed in the *parish of Amlwch* where he resided, and on that ground quashed the order of removal, subject to the opinion of the Court of King's Bench on the above case.

Nolan and *Curwood* in support of the order of sessions. The sessions had no power to make the amendment in the order of removal. The order was directed to the churchwardens and overseers of the parish of *Llanerchymedd*. Now, there were no churchwardens appointed, and churchwardens constitute an essential part of the body of parish officers. It is necessary for them to join in binding out a parish apprentice, *Rex v. Fairfax* (a); or in granting a certificate, *Rex v. St. Margaret's, Leicester*. (b) The words *parish* and *churchwardens* are material and essential parts of the order. No amendment can be made, except for mistake of form appearing on the face of the order. *Rex v. Great Bedwin*. (c) At all events, the sessions ought, if they could amend, have substituted the word *vill* for *parish*, and obliterated the word *churchwarden*. As the order stands, it is uncertain to whom it is addressed, or to what description of place it refers. Then as to the principal question; that resolves itself into two points: first, whether this was an office exercised in any part

(a) 3 Mod. 269.

(b) 81 East, 532.

(c) 2 Str. 1158.

of the parish of *Amlwch*; and, secondly, if it was, whether, not having been exercised in the whole of the parish, the pauper gained any settlement? As to the latter point, the statute only requires that the office should be executed within the parish; and in *Rex v. Fittleworth* (a) it was held, that it was not necessary that the office should extend over the whole parish. *Rex v. Liverpool* (b) is a decisive authority to shew, that where an office is executed in a parish, though not throughout the whole of a parish, it is sufficient to give a settlement. As to the other point, the pauper exercised his office in a part of the parish. It is the duty of the clerk to attend the minister, and it is stated in the case that his emoluments arise from the fees belonging to the office. [Bayley J. Does it appear that the pauper lived in that part of *Amlwch* over which his duties extended?] It is found as a fact that the pauper resided in *Amlwch*, and that a part of the duties of his office were performed there; and that the minister exercises some of his functions within the parish, and derives emoluments from them. And the fees of the clerk arise out of the same services as those of the minister. The ground upon which an office confers a settlement is notoriety. In this case, the clerk was appointed by the owner of an estate in *Amlwch*. The inhabitants of *Llanerchymedd* frequented *Llanerchymedd* chapel, and from time to time required and obtained the services of the clerk, and the sacramental elements were provided by the parish of *Amlwch*. It must, therefore, have been notorious to the parish, that the office of clerk of that chapel was exercised within it.

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(a) *Burr. S. C.* 238.(b) 3 *T. R.* 118.

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Tindal and Patteson contra. By the statute 5 G. 2. c. 119. s. 1. the justices, at sessions, are enabled to cause any defect in form in orders of removal to be amended. Now here the alleged defect was, that the order was directed to the *churchwardens* and overseers of the *parish* of *Llanerchymedd*, when, in fact, there were no churchwardens of *Llanerchymedd*, and it was a vill and not a parish. The order was directed to the churchwardens as overseers, and not because they were churchwardens, and, therefore, the word *churchwardens* may be rejected as surplusage. They need not have been mentioned at all, *Reg. v. Scarle (a)*. As to *Llanerchymedd* being described as a parish in the order, that is a mere matter of form. All that is required in point of substance is, that the order should be directed to officers of a district maintaining its own poor. Here it was intended to be addressed to the officers of a place called *Llanerchymedd*, maintaining its own poor, but that place has been incorrectly described. Besides, the objection is waived by the appellants having appealed against the order by the description of churchwardens and overseers of the poor of the parish of *Llanerchymedd*. Then, as to the material point, no settlement was gained in *Amlwch*, because no part of the duty of the office of clerk and sexton was performed in that parish. The authorities shew that the duties of the office must extend over the place where the pauper resides. In *Rex v. Liverpool (b)*, part of the churchyard was in the parish of *Liverpool*, and the pauper resided in that parish, and it was held that the churchyard being in two parishes, the sexton gained a settlement in that in which he resided; but there the duties of the

(a) 1 Bott. 3.

(b) 3 T. R. 118.

office of sexton were performed in that parish. In this case the chapel and chapel-yard were not within the parish of *Amlwch*, and, therefore, if the clerk's duties be confined to them, no part of the duties performed by the clerk were performed within the parish, and he cannot be settled in *Amlwch*. The sessions have stated evidence relating to other acts done by the clerk, but they have not stated whether those acts were done by him in the performance of his duties as clerk. The fair conclusion resulting from that evidence is that those acts were voluntary, and not done by him in discharge of his duty as clerk. The sessions, therefore, have not determined the point, whether the office was exercisable of right within the parish of *Amlwch*, and the evidence shews that it was not; but assuming that they have done so, an office executed in a limited and confined part of the parish does not confer a settlement. In *Rex v. St. Lawrence, Reading* (a), which was the case of the warden of a borough, the duties of his office extended over the whole parish in which he resided, as well as other parishes. The same observation applies to the case of a constable of a city comprehending several parishes, *St. Maurice v. St. Mary Kalendar* (b). The very ground upon which a settlement is gained by serving an office is, that it must be notorious to the whole parish that the office is exercised within it, *Rex v. Holy Cross, West-gate* (c). Now if the duties of the office be exercised in a very small portion of the parish, the fact of its being exercised within the parish may not be known to the parish officers.

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(a) 2 Bott. 156.

(b) 1 Burr. S. C. 27.

(c) 4 B. & A. 612.

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BAYLEY J. I am of opinion, that giving a fair construction to the stat. 5 G. 2. c. 119. s. 1. the sessions had the power to make the amendment in the order of removal, which they have done. That statute enacts, "That upon all appeals made to the justices at sessions against judgments and orders made by any justices, such justices so assembled at sessions shall upon all appeals so made to them, cause any defects of *form* that shall be found in any such original judgments or orders to be rectified and amended." It appears that in this case the order of removal was directed to the churchwardens and overseers of the *parish* of *Llanerchymedd*. In fact, there were no churchwardens of *Llanerchymedd*, and it was not a parish, but a vill. The persons for whom the order was intended received it, for they appealed against it, by the description given to them in the order. Upon the appeal they said, that *Llanerchymedd* was not a parish, but an extra parochial vill; in other words, they pleaded a misnomer; that was a mere matter of form. The case of *The King v. Great Bedwin* (a), is very distinguishable, because in the order of removal in that case there was no complaint from the churchwardens and overseers, nor any certificate that the person had actually become chargeable. Those were material facts and essential parts of the order, for the justices had no power to remove unless there was a complaint from the overseers, and a certificated person could not be removed, unless he was adjudged to be actually chargeable.

The second point forms the important question in this case; viz. whether the pauper exercised an annual office within the parish of *Amlwch* within the meaning

(a) 2 Str. 1158. Burr. S. C. 163.

of the 3 & 4 W. 3. c. 11. s. 6. That statute enacts, "That if any person shall execute any public annual office in the parish during one whole year, then he shall be adjudged to have a legal settlement in the same, though no such notice in writing be delivered and published as is hereby before required." The legislature considered the serving of an office within the parish to be a matter of such notoriety, that it was equivalent to the notice required in other cases. The question is, whether the pauper gained a settlement by executing the office of clerk and sexton in a part of the parish where he resided? In order to gain a settlement by serving an office, it is not necessary that the duties of the office should be co-extensive with the parish, it is sufficient if it be notorious to the parish that it is an office exercisable within it. In *St. Maurice v. St. Mary Kalendar, in Winchester* (a), and *St. Mary v. St. Laurence, Reading* (b), the duties of the tithingman and constable were performed in several parishes besides that in which the pauper resided. In *Rex v. Fittleworth* a certificate man was elected and sworn a tithingman for a tithing which did not extend through all the parish of *Fittleworth*, but comprehended that part of it where he resided; and it was held that it was not necessary that the office should extend throughout all the parish, the act only requiring the execution of some annual office within the parish. It is sufficient, therefore, to give a settlement in a parish that the duties of the office served extend into that parish. The question then is, whether the duties of any part of the office of sexton and clerk of the chapelry and vill of *Llanerchymedd* were of right to be performed in the parish of

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(a) 1 Burr. S. C. 27.

(b) 2 Bot. 156.

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Llanerchymedd. *Llanerchymedd* is a place. The duties, therefore, of the sexton of the chapelry may or may not be confined to the vill, for the chapelry is necessarily co-extensive. The four parishes, with the consent of the rector, may be a chapelry. It was, therefore, matter of course that the chapelry extended beyond the point there was a contrariety of evidence to me that the sessions have drawn from that evidence, that the duties were right performed in the parish of *Llanerchymedd*, a pauper, therefore, gained a settlement, some of the duties of the office were performed by the rector of *Llanerchymedd* appoints the clerk, the salary; but the owner of the tithes appoints the clerk, and repairs the chapel? One part is appropriate to the parish of *Llanerchymedd*, on the *Llwydiarth* estate, which is the *Amlwch*, the other part to the tithes of the *Llanerchymedd* estate. The inhabitants of the vill of *Llanerchymedd* sides, it appears to have been the duty of the minister of *Llanerchymedd* to attend to his clerk at the houses of the pauper. That may have been a matter of dispute and litigation. But I think the sessions have concluded, that it was a matter of course that be so, was not this a description of the parish of *Amlwch*? The *Amlwch* having furnished part of the tithes is a very strong circumstance in its favor. Notorious. Part of the charges of the parishes and overseers of *Amlwch* is

have been for bread and wine furnished to *Llanerchymedd* chapel. That affords a strong inference that the chapel was erected for the benefit of *Amlwch* as well as for the vill. I think the fact of the sacramental elements having been provided by *Amlwch* is sufficient evidence of the notoriety that the office of Clerk of *Llanerchymedd* chapel was exercised within *Amlwch*. That being so, I think the order of sessions must be affirmed.

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HOLROYD J. I think that the order of sessions was right. On the first point I am satisfied that the amendment made by the sessions respected a mere matter of form. The order was directed to the churchwardens and overseers of a district called a parish. It was material in point of substance, that it should be directed to a district, the inhabitants of which were bound by law to maintain their own poor, but it was wholly immaterial in point of substance, whether that district was a parish or vill; and supposing it to be not a parish but a vill, the sessions were right in making the alteration in the direction of the order, because that was a mere matter of form.

The other question is, whether this was an office exerciseable within the district where the pauper resided. I am clearly of opinion that the pauper must be taken to have resided in that part of the parish where the duties of his office were to be executed. Considering that the parish of *Amlwch* contributed to the sacramental elements, and that it was the uniform practice of the clergyman and clerk to visit the sick in the parish of *Amlwch*, and beyond the limits of the chapelry; and that the pauper resided in that part of the parish wherein

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SHADDICK, Administratrix of J. SHADDICK,
against BENNETT, Gent., One, &c.

THIS was an action brought by the plaintiff, as administratrix of *J. Shaddick*, a clerk of the court of chancery, to recover from the defendant 26*l.* for business done by him as clerk in court from the year 1807, to his death in 1818. Plea, first, the general issue; second, the statute of limitations. At the trial, it was proved, that the business was done by the deceased for the defendant between the years 1807 and 1818, and that the bill of costs amounted to the sum of 26*l.* In order to take the case out of the statute of limitations, the plaintiff put in a letter from the defendant dated in *January* 1825, in which he stated that he did not owe the estate of the deceased more than 3*l.* The plaintiff having obtained a verdict for that sum, a rule nisi was obtained for entering a suggestion on the roll under the *London* court of conscience act, the 39 & 40 G. 3. c. 104. s. 12., by which it is enacted, "That if any action shall be commenced in any other court than the said court of requests for any debt not exceeding the sum of 5*l.*, the plaintiff shall not by reason of a verdict for him, be entitled to any costs whatever."

The sum recovered by verdict is to be considered the debt for which the action is brought, within the *London* court of requests act, 39 & 40 G. 3. c. 104. s. 12., and therefore where the entire debt (which exceeded 5*l.*) was contracted more than six years before the commencement of the action, and the plaintiff, in answer to a plea of the statute of limitations, proved a promise within six years as to 3*l.* only, it was held that the plaintiff was not entitled to costs.

Scarlett and *Tindal* now shewed cause. This action was brought for a debt originally exceeding the sum of 5*l.* The statute of limitations does not destroy the debt, but only bars the remedy. The debt originally contracted continued, and the action was brought for

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for that debt. This is a case, therefore, not w
 words of the act of parliament. Besides, it was in
 for the plaintiff to know that the defendant wo
 himself of the statute of limitations as a defenc
 he had not, then the plaintiff would have been ei
 recover the whole debt. *Clark v. Askew* (a), and
v. Smith (b), do not apply to the present case, bec
 words of the statutes on which those cases were
 were very different from the present. The first
 cases arose upon the *Southwark* court of requests
 words of that act are, "That if it shall appea
 Judge that the debt to be recovered by the
 doth not amount to 40s., &c., the plaintiff s
 the defendant costs." The second case arose u
Middlesex county court act, which gives the
 ant double costs if the jury find the damages
 plaintiff under 40s. In those cases, the deb
 reduced below that sum, in the first case
 payment, in the second by the plea of infanc
 held to be within the acts of parliament. *J*
v. Larkin (c) comes nearer the present case, and
 cision was in favour of the construction now co
 for. There the *Rochester* court of requests act
 that debts of a given amount, contracted wit
 jurisdiction of that court, should be sued for in th
 only. The jury found a verdict for the plainti
 sum less than that specified in the act of parliam
 original debt, which was much larger, having b
 duced, partly by payment before action broug
 partly by the jury's having estimated the work
 a lower price than it had been previously estim

(a) 8 East, 28.

(b) 14 East, 301.

(c) 5 Brod. & L

surveyors appointed by the parties, and that was held 1825.
not to be a case within the act.

SHADDICK
against
BENNETT.

Adolphus contra. The act of parliament contemplated only such debts as were recoverable by action in a court of law. It is true, that *Clark v. Askew*, and *Bateman v. Smith*, were decided on acts of parliament somewhat differently worded, but all these acts being in *pari materia*, ought to receive a similar construction.

ABBOTT C. J. I am of opinion that the debt for which the action is brought must be ascertained by the sum which is afterwards actually recovered. The verdict alone can be evidence of the sum recovered. By holding otherwise we should often open a door to great litigation. Although there may be some difference of expression in the different acts of parliament by which jurisdiction is given to courts of requests, yet, as they all have the same object, I think they ought to be similarly construed. It has been said that the original debt continued, although the plaintiff was barred from recovering the greater part of it by the statute of limitations; but I think that within the meaning of this act of parliament, there can be no debt without a legal remedy to enforce the payment of it. The rule for entering the suggestion must be made absolute.

Rule absolute.

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The KING *against* J. ADLARD.

A person is not liable to serve the office of constable unless he be resident in the parish, and therefore a person occupying a house and paying all parish rates in respect of it, and carrying on the trade of a printer, frequenting the house daily on all working days, and sometimes remaining there during the night at work, but not sleeping in the house, is not liable to serve the office of constable in the parish where the house is situate.

INDICTMENT charged that the defendant was an inhabitant and residing within the parish of *Saint Bartholomew the Great*, in *London*, and able and liable to serve the office of constable for the said parish; that he was duly elected and appointed to be one of the constables for the parish, and that he neglected and refused to take upon himself the execution of the said office. The second count was similar to the first, except that it averred only that the defendant was an inhabitant of the parish, leaving out the words "and residing."

The defendant pleaded not guilty. At the trial before *Abbott C. J.*, at the *London* sittings after *Easter* term 1824, a verdict was found for the crown, subject to the opinion of this Court on the following case.

The defendant, on the 22d of *December* 1823, and for several years preceding, occupied under a lease at a yearly rent of 55*l.*, certain premises in *Great St. Bartholomew Close*, in the parish of *St. Bartholomew the Great*, and he continued to occupy them from thence till the time of the trial, but lived in an adjoining parish, two or three yards out of the parish of *St. Bartholomew the Great*. For the premises so occupied by the defendant in *St. Bartholomew the Great*, he was assessed in the said parish at 25*l.* a year, and paid the church rate and poor rate, and all other parish and other rates in the said parish. Upon these premises the defendant carried on the trade of a printer, employing in such trade a considerable number of men,
and

and the defendant himself, for the purposes of his trade, was in the habit of resorting to the premises on working days, and attending there from an early hour in the morning till a late hour in the evening, and at some times he remained there through the night at work; but neither the defendant nor any other person slept on the premises, which were in no way calculated for a dwelling-house, being fitted up only as a counting-house, printing offices, and warehouses. The defendant, on the 22d *December* 1823, was duly chosen one of the constables for the said parish for the year ensuing. The defendant refused to take upon himself the office, alleging that he was not liable to serve the same, on the ground that no person slept on the premises occupied by him within the parish of *St. Bartholomew the Great*. The case was argued on a former day in this term, by

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The King
against
Adams

Bolland for the Crown. The question in this case is, whether the defendant under the circumstances stated in the case was an inhabitant of the parish of *Saint Bartholomew*, and liable to serve the office of constable. In *Rex v. Poynder* (a) the several partners of a firm had a dwelling house, yard, and premises in a parish in *London*, which was frequented daily by all the partners for the purposes of business. None of them resided there, but the house was inhabited by a clerk who managed the business for them, the rent, rates, and taxes being paid by the firm. In that case one of the several partners was held to be a householder within the 43 *Eliz. c. 2.*, and liable to serve the office of overseer, and that the same construction was to be put upon the statute, whether it

(a) 1 B. & C. 178.

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imposed a burden, or conferred a privilege; and *Rev v. Hall* (a), is an authority to the same effect. Those cases turned on the meaning of the word householder; the question here is, whether the defendant be an inhabitant liable to serve the office of constable. Lord Coke, commenting on the statute of bridges (b) which imposes the burden of making bridges on the inhabitants of the shire, says, "The word *inhabitants* is the largest word of the kind; for although a man be dwelling in a house in a foreign county, riding, city, or town corporate, yet if he hath lands or tenements in his own possession and manurance in the county, riding, city, or town corporate where the decayed bridge is, he is an inhabitant, both where his person dwelleth, and where he hath lands or tenements in his own possession within this statute." This is an authority to shew that a party may be an inhabitant in a place where he does not sleep. Lord Coke, in a note to *Griesley's* case, (c) says, that the common law requires that the constable should be *idoneus homo*, i. e., apt and fit to execute the said office; "and he is said in law to be *idoneus* who has these three things, honesty, knowledge, and ability; honesty to execute his office truly, without malice, affection, or partiality; knowledge to know what he ought duly to do; and ability, as well in estate as in body, that he may intend and execute his office when need is, diligently." Now a person who does not sleep in a parish or district may have all these qualities which Lord Coke describes the word *idoneus* to comprehend, and which render the individual a fit person to serve the office. In *Jeffrey's* case (d) it was decided that a person who occupied lands

(a) 1 B. & C. 123.

(b) 2 Inst. 702.

(c) 8 Co. 75.

(d) 5 Co. 67.

in the parish, but did not dwell in it was a parishioner liable to contribute to the church rate. And it was resolved that although the house wherein *Jeffrey* dwelt were in another parish, yet, forasmuch as he had lands in the parish of *Haylesham* in his proper possession and manurance, he was in law parochianus de *Haylesham*. "For the place where he lies, sleeps, or eats, doth not make him a parishioner only; but forasmuch as he manures land in *Haylesham*, and by that is resident upon it, that makes him a parishioner of *Haylesham* also as to this purpose." It is, therefore, clear, that a person is bound to bear pecuniary burdens in the character of an inhabitant, although he does not dwell in the parish. The office of constable may be served by deputy, and, therefore, it is in the nature of a pecuniary burden. In *Rex v. Clapp* (a) a person who occupied lands in a parish, but who lived out of it, was held to be bound to receive a parish apprentice, and in *Rex v. The Directors and Guardians of the Poor of Tunstead* (b), Lord Kenyon expressly said that the word inhabitants as used in the stat. of 43 *Eliz. c. 2.* had been held not to be confined to residents. It may be said that if in an indictment for a burglary the house had been described as the dwelling house of the defendant, that averment could not have been supported by proof. That may be true, but it does not follow that the defendant may not be an inhabitant liable to serve the office of constable; he is equally fit for the office, and, therefore, comes within the meaning of the word idoneus, whether he sleep in the house or not.

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The King
against
ADLARD.

(a) 5 T. R. 107.

(b) 3 T. R. 523.

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The King
against
ADLARD.

Brougham, contra. *Rex v. Hall* (a) and *Rex v. Poynder* (b) turned on the meaning of the word householders, and the qualification required was property. *Grisley's* case (c) is referred to only for the sake of the note which relates to the word *idoneus*. The prescription there was to hold a court-leet of inhabitants and *resiants*, and the custom was to choose an inhabitant. And in *Com. Dig. tit. Leet*, M 6., that case is cited, to shew that the leet may elect one of the *resiants* constable. *Jeffrey's* case (d) only decided that the party was rateable as a parishioner to the repair of the church. A parishioner is not of necessity fit to serve the office of constable, though he may be fit to bear a pecuniary burthen. Lord Coke in his commentary on the statute of bridges (e) says, "that every corporation and body politic, residing in any county, &c. or having lands or tenements in any shire, &c. are inhabitants there within the purview of this statute." But a corporation cannot be said to dwell or to be inhabitants within the meaning of this indictment. These authorities only shew, that where the object of the law is to impose a pecuniary burthen, and it is imposed on inhabitants, eo nomine, persons who do not dwell in the place where the burthen is to be imposed, may come within the meaning of the word inhabitants, construed with reference to the subject matter to which it is then applied. But the duty of the office of constable is wholly personal. *Rex v. Clapp* (f) was a case which arose on the 43 *Eliz. c. 2.* which charges persons in respect of their pecuniary ability. It is said, however, that the defendant is liable to serve the office of constable, in

(a) 1 B. & C. 123.

(b) 1 B. & C. 178.

(c) 8 Co. 75.

(d) 5 Co. 65.

(e) 2 Inst. 702.

(f) 5 T. R. 107.

respect of the tenement which he occupied within the parish, although he was not a resiant within it. Now a constable was formerly appointed at the court-leet. In *Com. Dig.* tit. *Leet*, M 6. it is laid down, that his election belongs to the leet, and properly to the homage there; and 4 *Inst.* 265. is cited. In 2 *Hawk. P. C.* book 2. c. 10. s. 12., it is expressly laid down, that no man can be obliged to do suit to the court-leet, within the precincts whereof he doth not reside, in respect of any lands which he may have within the jurisdiction of it; for that no suit of this kind is due *in respect of the tenure of any land*, but only in respect of the personal residence of the party. And “if a man have a house which stands upon the precincts of two leets, he shall do his suit to the court within the jurisdiction of which his bed-chamber lies;” and 2 *Inst.* 122. is cited. It is clear, therefore, that the constable is to be appointed by the resiants within the leet, and he must be chosen out of that body, because the Court have no jurisdiction over persons residing out of the precincts of the leet; they could not impose a fine upon such a person for not attending the leet. In Lord Bacon’s *Treatise on the Office of Constable*, (a) it is laid down, that the petty constables in towns ought to be of the better sort of resiants in the same. In *Prouse’s case* (b) a special custom was alleged, for all householders to serve the office of constable or tithingman, by turns, according to the situation of *their houses*, and it was held to be bad. The custom would have been immaterial if householders were liable by common law. The stat. 29 G. 2. c. 25., which is an act for appointing a

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(a) *Bacon’s Works*, vol. iv. p. 311., ed. 1805.(b) *Cra. Car.* 589.

sufficient

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sufficient number of constables for *Westminster*, directs that the persons should be known *residing* within the city and liberty. If a party be liable to serve the office of constable, in respect of a tenement, he will also be liable in respect of a cow-shed, a field, or a garden; and this absurdity will follow, that he may be called upon to serve at the same time in different places.

Cur. adv. vult.

ABBOTT C. J. The question in this case was, whether the defendant was by law liable to serve the office of constable. And the facts stated in the special case raise the question, whether the occupier of a tenement in a parish, not used as a dwelling-house, be liable to serve this office. The question will be the same, whether the tenement consist of building or land, of more or less value. In support of the prosecution it was contended, that such an occupier is an inhabitant of the parish wherein the tenement is situate; and for many purposes undoubtedly he is so. But the word inhabitant, like many other words in our own and other languages, varies in its import, according to the subject to which it is applied. It may be said generally, that such an occupier is an inhabitant for all purposes of pecuniary charge; for the church rate, to which by law all inhabitants are said to be contributory; to the repairs of the highways by the common law; to the repair of bridges by the statute 22 H. 8. c. 5., if not by the common law. Lord Coke in his commentary on this statute, 2 *Inst.* 702., after observing that the word *inhabitant* is the largest word of the kind, and describing all occupiers as inhabitants within the meaning of the statute, says, "that servants are not within the statute."

statute." I have not noticed the poor laws, because occupiers are mentioned in the statute of *Elizabeth*, as well as inhabitants. But in all these cases, as was properly observed on the part of the defendant, the object is to raise a sum of money by taxation of the property within the district, and for the purpose of such taxation, it is wholly immaterial whether the occupier be a resident within the district or without; and, therefore, a non-resident occupier may not unreasonably be deemed an inhabitant for such a purpose, where that word happens to be the only word used in the description of the persons who are to bear the burthen.

But the office of constable is of a different character, it is a personal, not a pecuniary service. It is to be performed by personal attendance within the district, the constable is supposed to be known to all the inhabitants within the district, and they are bound to yield obedience to him, and to be assisting to him at his command, in the exercise of his lawful authority. In ancient times the constable was most generally appointed at the leet or view of frankpledge, and still is so appointed in many places, though by reason of the disuse of that court, other modes of appointment have been introduced, and are now probably become the most general. A reference, however, to this mode of appointment, which may perhaps be considered as the origin of the office, will help to shew the description of persons liable to serve it. Now the view of frankpledge is almost universally spoken of in our books as the view of the resiants within the leet. The constant form of alleging a prescription for a leet, is to call it a view of frankpledge of all the inhabitants and resiants within the district; and if at any time the word inhabitant occurs
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alone, it is evidently used in the sense of resident, as in the allegation of the custom in *Griesley's case*, 8 Co. 76. By the statute of *Marlbridge*, c. 10. where the sheriff's tourn is spoken of, it is enacted, that those who have tenements in diverse hundreds need not attend the tourns, except in the bailiwicks wherein they are conversant. And upon this Lord Coke says, 2 Inst. 192., "If a man hath a house within two leets, he shall be taken to be conversant where his bed is." This is a plain authority that the word inhabitant, when the view of frankpledge is spoken of, cannot mean an occupier. It also cannot have that meaning, because all males above the age of twelve years were bound to attend and do suit and service, many of whom could not be occupiers. And if occupiers as such were not members of the court leet, nor bound to do suit and service there, it seems necessarily to follow that the Court could not require them to take this office.

It was argued, however, that a non-resident occupier may be appointed to this office, because it may be executed by deputy. I do not know that the appointee can substitute a deputy of his own authority alone, without the sanction or consent of some other authority; but supposing that he can, we think it by no means follows, that he is therefore compellable to take upon him an office in its nature requiring personal services, especially where no necessity for his appointment is shewn. For these reasons, we think the verdict taken at the trial should be set aside, and a verdict entered for the defendant.

Judgment for defendant.

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The KING *against* WESTWOOD.

QUO warranto for usurping the office of burges
of *Chepping Wycombe*, in the county of *Bucks*.
Plea, first, that *Chepping Wycombe* has been a borough
from time immemorial, and that during all that time
there have been within the borough a mayor, two
bailiffs, and an indefinite number of burgesses, of which
burgesses there have been twelve sometimes called prin-
cipal burgesses, sometimes capital burgesses, and for a
long time called aldermen, who, together with the
bailiffs, have been a common council, to assist the
mayor. That from time immemorial there hath been
an ancient and laudable custom within the borough,
that the mayor and common council for the time being,
or the major part of them, duly assembled together for
that purpose, have from time to time by themselves,
and without the concurrence or assistance of the rest
of the burgesses, nominated and elected, to us, &c. such
person or persons to be a burges or burgesses of
the said borough, as to them, the mayor and common
council for the time being, or the major part of them so
assembled, hath seemed meet. Defendant then alleged
his election according to the custom. The second plea
was similar in substance, but stated generally that there

A charter granted by the crown to a corporation cannot be partially accepted, whether it be a charter of creation, or granted to a pre-existing corporation.

The power to make bye-laws is incident to the whole body of every corporation; and, therefore, if a charter give to a select body power to make bye-laws touching certain matters therein specified, that does not take away from the body at large their incidental power to make bye-laws touching other matters not specified in the charter.

Where a corporation consisted of mayor, bailiffs, aldermen, and burgesses, (of whom the

bailiffs and aldermen were chosen out of the burgesses, and formed a common council,) and the charter gave to the mayor and burgesses power to elect burgesses; and the corporation at large made a bye-law, vesting the right to elect burgesses in the mayor and common council: Held, that the bye-law was good, the burgesses at large being represented by the common council, inasmuch as the bailiffs and aldermen who composed the common council were elected from amongst the burgesses, per *Holroyd* and *Littledale J.* Disson-
ciente Bayley J.; *Abbott C. J.* dubitante.

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Wickwood.

ought to be, and was a common council, without stating how it was constituted. The third plea alleged that the borough of *Chepping Wycombe* had been from time immemorial an ancient borough, and that long before and at the time of granting the letters patent thereafter mentioned, the burgesses of the said borough were a body politic and corporate called and known by the name of mayor, bailiffs, and burgesses, and that from time immemorial there had been an indefinite number of burgesses within the said borough, and that king *Car. 2.* in the 15th year of his reign, did, by letters patent, “grant, ordain, constitute, and confirm to the said mayor, bailiffs, and burgesses, that there should thenceforth be one mayor, two bailiffs, and twelve discreet men continually residing within the borough, who should be called aldermen. And that the *mayor, bailiffs, and burgesses of the borough, and their successors, or the major part of them, from time to time for ever should and might be able to elect so many and such other men, inhabiting or not inhabiting within the borough, as to them should seem most expedient to be burgesses of the said borough.* And the said king did thereby grant and confirm to the said mayor, bailiffs, and burgesses that the said aldermen and bailiffs should be and be called the common council of the borough, and that the mayor, aldermen, and bailiffs of the borough, and their successors for the time being, or the major part of them (of whom the mayor for the time being the said late king willed to be one) might and should have full power and authority to frame, constitute, ordain, and make from time to time such reasonable laws, statutes, and ordinances whatsoever as to them should seem to be good, wholesome, useful, honest, and necessary, according to their sound discretion, for the good rule and government of the
burgesses,

burgesses, artificers, &c. inhabitants of the borough aforesaid for the time being; and for declaring in what manner and order the aforesaid mayor, aldermen, bailiffs, and burgesses, and the artificers, inhabitants and residents of the borough aforesaid should behave, conduct, and carry themselves in their offices, mysteries, and business within the same borough, and the limits thereof for the time being, and otherwise for the further good and public advantage and rule of the same borough, and the victualling of the same borough, and also for the better preservation, government, disposition, letting, demising of lands, tenements, possessions, revenues, and hereditaments to the aforesaid mayor, bailiffs, and burgesses, and their successors by the said letters patent or otherwise given, granted, assigned, or confirmed, or thereafter to be given, granted, or assigned, and other matters and causes whatsoever touching or in anywise concerning the said borough, or the state, right, and interest of the same borough." The plea then recited part of the charter nominating the first officers of the borough, and set out the mode of electing them in future as follows: "And the said late king, by his said letters patent for himself, &c., further granted and confirmed to the said mayor, bailiffs, and burgesses, that the aforesaid mayor, aldermen, bailiffs, and burgesses of the borough aforesaid for the time being, or the major part of them, from time to time for ever thereafter, might and should have power and authority yearly and every year on the *Thursday* next before the feast of *Saint Michael* the Archangel, to assemble themselves, or the major part of them, in the guildhall of the borough aforesaid, or in any other convenient place within the borough to be limited and assigned according to their discretion, and there to continue until they or the major part of them there then

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assembled should choose, elect, and nominate on aldermen of the borough aforesaid to be mayor borough aforesaid for one whole year then next e and that then and there they should and might to elect and nominate, before they should from depart, one of the aldermen of the borough afore the time being, who should be mayor of the borough aforesaid for one whole year then next ensuing: and he, after he should be so elected, before he should be admitted to execute the same office, should take corporal oath (within a certain time) before the mayor last predecessor, if present; or if he should be then before such of the aldermen and the rest burgesses who should be present, faithfully to execute the same office. And his said late majesty king the Second by his said letters patent for himself, his heirs and successors, further granted and confirmed to the aforesaid mayor, bailiffs, and burgoes of the borough aforesaid, and their successors the mayor, aldermen, and bailiffs of the borough aforesaid for the time being, or the major part of them, from time to time for ever thereafter, might should have power and authority yearly and ever on *Thursday* next before the feast of the *Annun* of the *Blessed Virgin Mary*, to assemble themselves the major part of them, in the guildhall of the borough aforesaid, or in any other convenient place within the borough aforesaid, to be limited and assigned according to their discretion, and there to continue until the next major part of them there then assembled should elect and nominate two burgesses of the borough aforesaid and two bailiffs of the borough aforesaid for one year then next ensuing: and that they, after they should be so elected, before they should be admitted to execute the same

should (within a certain time) take a corporal oath before the mayor, or, in his absence, before the bailiffs, their last predecessors, or either of them, in the presence of such of the aldermen and the rest of the burgesses who should there be present. And his said late majesty king *Charles* the Second by his said letters patent for himself, his heirs and successors, further granted to the said mayor, bailiffs, and burgesses of the borough aforesaid, that if any or either of the aldermen of the borough aforesaid should die, or be removed from his office, (which said aldermen and every or any of them not well behaving themselves in the same office, his said late majesty willed to be removable at the pleasure of the mayor of the borough aforesaid, and the major part of the aforesaid aldermen of the same borough for the time being,) that then the mayor and such of the residue of the aldermen of the borough aforesaid, who should be assembled in the guildhall of the borough aforesaid, or in any other convenient place within the borough aforesaid, to be limited and assigned according to their discretion, or the major part of them so assembled, at the pleasure of the mayor and the residue of the aldermen of the same borough, should and might be able to elect and prefer one or more of the best and most honest burgesses of the borough aforesaid in the place or places of the same alderman or aldermen of the borough aforesaid so dead or removed from his or their office or offices, to supply the aforesaid number of twelve aldermen of the borough; the person so elected to take the oath before the mayor, or before the bailiffs or either of them. As by the said letters patent now remaining of record in the High Court of Chancery appears." The plea then averred that the charter was duly accepted; and that afterwards, to wit, on, &c., the

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then mayor, bailiffs, and burgesses of the said borough being in due manner met and assembled for that purpose within the said borough, did then and there duly make a certain ordinance or bye-law (not now extant in writing) for the better rule and government of the said borough, touching and concerning the election of the burgesses of the said borough for the time then to come, in order to avoid popular confusion and disorder in such elections, by which said ordinance or bye-law it was ordained and established in manner following: that is to say, that from thenceforth the mayor and common council of the borough, or the major part of them duly assembled together for that purpose within the said borough, should and might from time to time, and at all times thereafter by themselves, and without the concurrence or assistance of the rest of the burgesses of the said borough, elect and choose such person or persons to be a burgess or burgesses of the same borough as to them the said mayor and common council of the said borough, for the time being, or the major part of them so assembled as aforesaid should seem meet; and which said ordinance or bye-law hath ever since the making thereof hitherto been constantly kept and observed by the said mayor, bailiffs, and burgesses of the said borough, and is still in full force. The plea then stated the election of the defendant according to the bye-law. There were several general replications putting in issue the facts alleged in the pleas, and then a special replication to the first and second pleas, setting out the charter of the 15 Car. 2., whereby it was granted that the mayor, bailiffs, and burgesses, and their successors, or the major part of them, from time to time for ever should and might be able to elect so many and such other men, inhabiting

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inhabiting or not inhabiting within the borough, as and which to them should seem most expedient to be burgesses of the said borough; and averred that under and by virtue of the said letters patent, the burgesses of the borough continually from and after the granting thereof hitherto have been eligible, and of right ought to have been elected, and still of right ought to be elected from time to time by the mayor, bailiffs, and burgesses at large of the said borough, or the major part of them, and not otherwise. General demurrer to the third plea. Rejoinder (after praying that the charter might be enrolled, by which it appeared to contain at the end a general confirmation of all liberties, franchises, immunities, privileges, &c. before vested in the corporation) that the said letters patent were not duly accepted by the then mayor, bailiffs, and burgesses of the said borough as to that part thereof whereby his late majesty *Car. 2.* did will and ordain that the mayor, bailiffs, and burgesses of the same borough, and their successors, or the major part of them from time to time for ever should and might be able to elect so many and such other men inhabiting or not inhabiting within the borough, as and which to them should seem most expedient, to be burgesses of the borough. Special demurrer because defendant hath not in his rejoinder stated or set forth any charter or letters patent, or other matter of record, dispensing with a total acceptance of the said letters patent; and also because he hath stated and alleged the supposed partial acceptance of the said letters patent as a matter of fact triable by the country, instead of stating and setting out therein, as he ought to have done, the charter or other matter of record (if any) authorising such supposed partial acceptance. Joinder in demurrer. The case was argued in *Michaelmas* term 1824, by

bridge (a), but has never been decided ; but until a contrary opinion was intimated by Lord *Mansfield* in that case, it does not appear to have been doubted that a charter must be accepted or rejected in toto. If the decision in *Rex v. Vice-Chancellor of Cambridge* had rested on the ground that a charter might be partially accepted, of course it would be a strong authority for the defendant, but that principle was quite unnecessary to the judgment ; the true ground of the decision was, that the statutes given to the University by Queen *Elizabeth* were never intended to apply to the high steward. And accordingly we find *Buller J.*, in *Rex v. Amery* (b) a subsequent case, saying, that it is a mistake to suppose that a charter may be accepted in part and rejected as to the rest. (c) Upon principle a corporation can have no such power. All corporate bodies exist by the king's authority ; prescription only supplies the place of a charter. Now, if a corporation having several charters, could accept a part of each and reject the residue, they would erect a constitution of their own, perhaps totally different from that which the crown intended to establish. At all events there can be no partial acceptance without the assent of the crown, which must be shewn by some matter of record ; the rejoinder is, therefore, bad in form, inasmuch as the partial acceptance is pleaded as a matter in pais triable by a jury. The crown is, therefore, entitled to judgment upon this part of the record also. [*Abbott C. J.* Perhaps it will be contended that the charter merely gave to the mayor, bailiffs, and burgesses, by their corporate name, power

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(a) 3 Burr. 1647.

(b) 1 T. R. 575.

(c) See *Rex v. Roulledge, Doug. 535.*, where *Buller J.* expressed a similar opinion.

inconsistent with that custom. Thirdly, the bye-law stated in the third plea is good; and if so, the defendant is entitled to judgment on the demurrer to that plea. As to the first point it must be admitted, that the acceptance of a charter in general by the persons incorporated is necessary; dict. in 2 *Brown and Golds*, 100.; and the general form of pleading such acceptance is conclusive, for there is no better evidence of the law than the forms of pleading; *Co. Litt.* 115 *b*. No doubt the crown might, if it thought proper, compel a corporation to accept all or none; and if the corporation be newly created, the acceptance of part will be the acceptance of the whole, otherwise the corporation would make a charter for themselves. But where there is a pre-existing corporation there are authorities in the books before *Rez v. Vice-Chancellor of Cambridge*, to shew that there may be an acceptance of part of a charter. In *Haddock's* case (*a*) it is said, that the ancient powers and privileges of a corporation are not merged or extinguished by a new charter; and in the report of the same case, in 1 *Ventr.* 355., the point is put upon the acceptance of the new charter; so, also, is *University of Cambridge v. Bishop of York*. (*b*) In *Reg. v. Larwood* (*c*) it appeared that a new charter was granted to an old corporation by king *Car. 2.*, and which altered some of their former privileges; and Lord *Holt* says, "If a corporation accept such charter it is good; and here is evidence of their acceptance, for the commonalty used heretofore to elect both the sheriffs, and now they elect but one of them." The acceptance, therefore, must be made out by user. The next case upon the subject is

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(*a*) *Sir T. Raym.* 435.(*b*) 10 *Mod.* 207.(*c*) 1 *Ld. Raym.* 29.

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Rex v. Vice-Chancellor of Cambridge, which is an express authority for the legality of a partial acceptance. Lord Mansfield says, "There is a vast deal of difference between a new charter granted to a new corporation, who must take it as it is given, and a new charter given to a corporation already in being, and acting either under a former charter or under prescriptive usage. The latter, a corporation already existing, are not obliged to accept the new charter in toto, and to receive all or none of it. They may act partly under it and partly under their old charter or prescription." And Lord Mansfield does not allude to that other ground upon which the judgment is said to have proceeded. *Wilmot J.*, indeed, says, "I do not think that this superior office of high stewardship is included in this statute, which begins with specifying persons of much inferior rank;" but he also agrees with what had been laid down respecting the partial acceptance of charters; and *Yates J.* was of the same opinion. In this doctrine there is nothing unreasonable, for if the grantees reject a part of the grant the whole may be repealed by scire facias; but if the crown does not interfere and express its dissent from the partial acceptance, that is valid. And this partial acceptance is properly pleaded. The acceptance of a whole charter is always alleged in the same manner, and *Reg. v. Larwood* shews that it is a matter in pais of which user is the proper evidence. If the acceptance of a whole charter is a fact to be tried, why should not a partial acceptance be tried in the same mode? No formal return can be made to the grant of a charter as to a writ; nothing is to be done under seal or by matter of record. The case of *Rex v. Vice-Chancellor of Cambridge* is not contradicted by

by *Buller J.* in *Rex v. Amery*, for there the former charter was held to be void, and the new charter was, in fact, a charter of creation. The observations of *Buller J.* taken with reference to such a state of things, agree with the opinion expressed by Lord *Mansfield* in the former case. Secondly, the replication gives no legal answer to the first and second plea. The charter is expressly confirmatory of former franchises and privileges, and is not inconsistent with the custom set out in the pleas. The pleas state the customary mode of electing burgesses to be by the mayor and common council, the common council consisting of two bailiffs and twelve burgesses; who were also aldermen. A custom so to elect is quite consistent with the charter, which gives the mayor, bailiffs, and burgesses power to elect, but does not appoint any specific mode of election. If the crown had intended to alter this, no doubt the alteration would have been introduced by a recital, or some other mode indicative of the intention. But, in the absence of that, it is consistent with the charter to say that the mayor, bailiffs, and those burgesses in whom the right of election was before vested shall now elect burgesses, particularly as the charter is rather one of confirmation than of new grants. Thirdly, the bye-law stated in the third plea is a valid bye-law, and the defendant is entitled to judgment on the general demurrer to that plea. It is objected, that the charter having given power to make bye-laws to the select body this is bad, having been made by the body at large. But the select body have power to make bye-laws as to certain matters only specified in the charter, and the regulation of elections is not one of those matters. Now the power to make bye-laws is incident to every corporation, according to the case

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bye-law in question is good; the defendant is, therefore, entitled to judgment on the demurrer to his third plea.

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There being a difference on the bench as to some of the points, the Judges now delivered their opinions seriatim.

LITLEDALE J., after stating the pleadings, proceeded as follows: — As to the pleadings on the first and second pleas; first, the custom for the common council to elect, as stated in the first and second pleas, is put an end to by the charter. If a corporation accept a charter, which points out a different mode of election from that which has before prevailed, they must conform to it in all things, and, therefore, the replication is an answer to the first and second pleas. It has been argued, indeed, that this is mainly a charter of confirmation, and that it confirms the custom. In many respects it is a charter of confirmation, because the corporation was in existence before, and had many possessions, liberties, and privileges; and these were confirmed, but where any thing new is introduced it cannot as to them be considered a charter of confirmation. But in fact this custom is not confirmed. The general clause of confirmation has nothing to do with customs as to elections prevailing in the borough. The case of *Haddock* (a) does not apply. That was a return to a mandamus to restore an alderman, and the return was that he was removed under the proceedings, which are stated at length, and for that cause they could not restore him, and it was held that the return was good; and the Court said, that though

(a) *Raymond*, 435.

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by the charter stated there was no power given to the corporation to remove an alderman, yet when the aldermen, before the charter, were removable for reasonable cause, the same power still remained, for the charter did not merge or extinguish any of the ancient privileges, but the corporation might use them as before. But there the charter was silent, and, therefore, every thing remained as before, but here the charter points out a new mode of election. *Haddock's case* (a) and *The Queen v. Lorwood* (b), do not apply.

But then the rejoinder says the charter was not accepted in that part which relates to the election of the burgesses. I think that rejoinder is bad, because I think a corporation cannot accept a charter in part only. When a charter is given by the Crown, it is considered as forming a whole scheme formed upon deliberation for the good government of the borough. Some parts of this may not be what the corporation may like in themselves; but the Crown, on the other hand, may have granted them other valuable privileges as a sort of compensation for the inconvenience and trouble they might suffer from other parts. But the corporation would never have had the valuable parts unless they had had some of the troublesome ones also. In *The King v. The Vice Chancellor of Cambridge* (c) it was considered by Lord Mansfield that a corporation might accept a charter in part. In page 1656 he says "but there is a vast deal of difference between a new charter granted to a new corporation (who must take it as it is granted) and a new charter given to a corporation already in being, and acting either under a former charter, or

(a) *Ventris*, 355.(b) 1 *Lord Raymond*, 29.(c) 3 *Burr*. 1647.

under prescriptive usage. The latter, a corporation already existing, are not obliged to accept the new charter in toto, and to receive either all or none of it; they may act partly under it, and partly under their old charter or prescription." And Mr. Justice *Wilmot* (a) says, "It is the concurrence and acceptance of the university that give the force to the charter of the Crown, and they may take and accept the body of statutes or code of laws separately and distinctly; they are not bound to take all, or leave all." But though such is the law laid down it was not necessary to do so, because the office of High Steward was an ancient office existing long before the statutes of Queen *Elizabeth*, and from the language of those statutes, it is plain the Crown did not mean to interfere with the mode of electing the ancient officers in the university, except such as were particularly mentioned; and a question lately arose in this Court upon the construction of one of those statutes, whether a particular professorship fell within the meaning of it, viz. that all officers where the mode of election was not pointed out, should be elected as the Vice-Chancellor. That was not a general charter given to the university to form the whole constitution of it, but a selection of statutes for the election of particular officers, and it is by the aggregate of different statutes given at different times by the Crown that the university is governed. In *The King v. Amery* (b), *Buller J.* says, "The averment proceeds on a mistake by supposing that a charter may be accepted in part and rejected as to the rest. The only instance in which I have ever heard it contended that a charter could be accepted in part only, is where the king has granted

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(a) 3 Burr. 1661.

(b) 1 T. R. 589.

body then the right in the body at large is impliedly taken away, *Norris v. Staps* (a), recognised in *City of London v. Vanacker* (b), and it is considered that an express power given to the body at large is unnecessary, because they have it of themselves; and so in *Child v. Hudson's Bay Company* (c), it was held, that a corporation has an implied power to make bye-laws; but where the charter gives the company a power to make bye-laws, they can only make them in such cases as they are enabled to do by the charter, for such power given by the charter implies a negative that they shall not make bye-laws in any other cases. But that was a corporation established for a particular purpose, and the bye-law they made was out of the purposes for which they were incorporated, and therefore they could not make such a bye-law. But that does not establish the general proposition. In the case indeed of *Rex v. Head* (d), Lord Mansfield says, "The body at large had no power to make bye-laws, because that power is by the charter given to the common council, consisting of the mayor and aldermen: and the common council could not by a bye-law take away from the body at large the right of election which the charter had vested in the whole body." This, I should think, is not very accurately reported; in the first part of what Lord Mansfield says, it was not necessary so to determine, because the bye-law was bad in every way. Where the power to make bye-laws is given to a select body there can be no doubt but it must be exercised by the select body, and cannot be so by the body at large; but I think this

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(a) *Hob.* 210.(b) 1 *Ld. Raym.* 496. 5 *Mod.* 439.(c) 2 *P. Wms.* 207.(d) 4 *Burr.* 2521.

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rule only applies to the particular cases where the select body have the power given to them. The power belonging to the body at large, it is only an abridgment pro tanto of their privileges, but that which is untouched of their power remains as it was. There may be many reasons why the power to make bye-laws in particular cases may be given to a select body: but if bye-laws are necessary to be made as to other matters, there, unless the body at large have a power to make them, nobody can; for the select body certainly cannot go out of the powers conferred, and therefore many regulations which are almost essential for the good government of the corporation would be prevented from being made, and nothing done upon them. It is then material to consider whether the bye-law in question falls within the powers given to the select body; for if it does, the body at large had no right to make it. The words are certainly very large and extensive, but they do not appear to me to reach the present case. This, indeed, is not in the proper sense of the word *a bye-law*, it is an order made by the body at large to regulate the mode of election, which they have incidentally a right to do; to avoid popular confusion and tumult. It is not a thing which relates to the general government of the borough, it is only that instead of 1500 persons being present at an election, only fifteen shall be so. Besides, it would be a very extraordinary thing if, when the power of election is given to the body at large, a select body should have the right to control and regulate a power which the body at large possess. They may, indeed, by express words of a charter have such a power; but unless it be given by express words, they ought not to have it by general words; and then if the select body have no

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such power, such a regulation cannot be made at all, unless it be by the body at large; and this consequence would follow, that in a corporation where a select body have power to make bye-laws for particular purposes, no regulation can be made at all; the inconveniences of popular tumult and confusion must exist in such a corporation, and one of the powers in the corporation which from the case in *4 Coke* to the present time has always been regarded as belonging to a corporation, must be lost and cannot be exercised.

On the second question, whether aldermen may be substituted for the burgesses at large; it appears to have been the practice in ancient times, that in order to avoid confusion in popular elections, the number of the electors should be limited, and that though the charter gave the right of election to the burgesses at large, a less number than the whole actually made the election; and some questions having arisen on this, it was referred by the lords of the council to the judges, to know what the law in this case was, and it was resolved by the justices, upon great deliberation and conference had amongst themselves, that such ancient and usual elections were good, and well warranted by their charters, and by the law also; for in every of their charters they have power given them to make laws, ordinances, and constitutions for the better government and order of their cities or boroughs, and by force of which and for avoiding of popular confusion, they by their common assent constitute and ordain that the mayor or bailiffs, or other principal officers, shall be elected by a selected number of the principal of the commonalty, or the burgesses as is aforesaid, and prescribe also how such selected number shall be chosen, and such ordinance and

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constitution shall be good and allowable, and agreeable with the law and their charters for avoiding of popular disorder and confusion; and although now such constitution or ordinance cannot be shewn, yet it shall be presumed and intended in respect of such special manner of ancient and continual election (which special election could not begin without common consent), that at first such ordinance or constitution was made, such reverend respect the law attributes to ancient and continual allowance and usage, although it began within time of memory, *The case of Corporations. (a)* The same case is very shortly mentioned in *Jenkins*, 279. case 93. In *The Corporation of Colchester v. &c. (b)* it was held by Coke C. J. and the rest of the Court, that "If there be a popular election of the mayor and aldermen in corporation towns, and this happens to breed a confusion amongst them, this may be altered by their agreement, and by the common consent of all, to have their elections made by a fewer number, but not otherwise. But if by their charter they are to be elected by them all, then this is not to be altered but by and with the general assent of the whole town, and so by this means to take away confusion." The same doctrine is fully recognised in several subsequent cases in more modern times, viz. *Rex v. Tomlyns (c)*, *Rex v. Spencer (d)*, and *Rex v. Phillips*, Mayor of Carmarthen, and *Lee v. Wallis*, the particular circumstances of which it is not necessary now to state.

But cases have occurred where questions have arisen as to the application of the rule, and in *Rex v. Spencer*,

(a) 4 Coke's Rep. 77 b. 40 & 41 Edw.

(b) 3 Bulstr. 71. 13 James I.

(c) Cas. Temp. Hardw. 316.

(d) 3 Burr. 1327. 3.

who claimed to be a common councilman of *Maidstone* (a), the power of electing the common councilmen was in the mayor, jurats, and commonalty, and the charter gave a power to make bye-laws to the mayor, jurats, and common council. The mayor, jurats, and common council made a bye-law to restrict the number of electors to the mayor, jurats, and common council, and such of the common freemen as had served the office of churchwarden and overseer of the poor; it was held that the bye-law narrowing the number of electors could not be supported, because the bye-law restricting the number of electors was not made by the body who had the right of election, and also because it excluded such of the commonalty as had not served an office which had no connection with the corporate character. In *Rex v. Cutbush*, common councilman of *Maidstone* (b), the bye-law was made by the mayor, jurats, and common council to confer the right of election on the mayor, jurats, common council, and sixty senior freemen. There the bye-law was made by a select body, and was held bad; because the right of election was in the mayor, jurats, and commonalty. In *The King v. Head and Others*, freemen of *Helston* (c), it appeared that the burgesses were incorporated by the name of the mayor and commonalty; and by the charter four aldermen were created, who with the mayor were to be the common council, and had a power to make bye-laws. The right of election was in the mayor and commonalty, together with the aldermen. The common council made a bye-law with the assent of the commonalty, that the mayor and aldermen, exclusive of the commonalty, should elect the burgesses,

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(a) 3 Burr. 1827.

(b) 4 Burr. 2205.

(c) 4 Burr. 2515.

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and it was held bad. But there an integral part of the electors was excluded, viz., the commonalty, for the power of election was in the mayor, aldermen, and commonalty, and, therefore, they could not exclude the commonalty, who were by this means not represented. It may be observed, also, that the bye-law was irregular: 1st, Because not made by the mayor and aldermen only, who had the power to make bye-laws; they called in the commonalty to assist, not as forming part of the meeting, therefore, under the charter, it was bad. 2d, It was bad under the general powers in a corporation, because the aldermen as a body were not the corporation, as the mayor and commonalty were the corporation, and the commonalty were called in only to assist, and did not form an integral part of the meeting. 3d, It was bad, because if made by the mayor and aldermen only, they as a select body had no right to make bye-laws as to elections, where the right was vested in the mayor and commonalty, together with the aldermen. In *Rex v. Ashwell* (a) the right of electing the aldermen was by charter given to the mayor and burgesses, and they made a bye-law restricting the electors to the mayor and certain of the burgesses, viz., the recorder, aldermen, coroners, common councilmen, and such of the burgesses as had served the office of chamberlain or sheriff, and such bye-law was held good. In *Rex v. Bird* (b), the right of election of burgesses was by the charter in the mayor and burgesses, being the corporate body. The mayor and burgesses made a bye-law to restrain the number of electors to the mayor, aldermen, and eighteen burgesses there mentioned, and the defendant

(a) 12 East, 22.

(b) 13 East, 367.

was elected by the persons under the bye-law. No doubt was entertained as to the general right of the corporate body to make a regulation to limit the number of electors, and the defendant was held well elected. This is the last case on the subject, and in all these cases the general power of the corporate body is admitted. Then, there may be questions arise whether admitting the general right of the corporate body this restriction falls within the principles of law. And one objection may be, that the aldermen do not fairly represent the burgesses, because there is no doubt but in the body created by the bye-law or regulation the burgesses must be represented. I am very free to admit that there is as little representation of the burgesses as one can well imagine, and much less than has occurred in any of the cases. But still they do in a small degree represent the burgesses. The aldermen by being elected do not cease to be burgesses, they are still burgesses, ~~though~~ with more authority; they are not an integral part of the corporation. If there be a meeting of the body corporate, which consists of the mayor, bailiffs, and burgesses, it is not necessary that any of the aldermen should be present, and if they are present they do not vote as aldermen, but as burgesses. The aldermen are elected by the mayor and the residue of the aldermen. So that, though remotely, the burgesses have something to say to the election, and I think the aldermen may be considered as representing the burgesses; and they are only a different body from the burgesses at large when in their quality of aldermen they are to discharge the various duties assigned to them. It must be observed, also, that this mode of election is that which was adopted by custom before the charter in question, and, therefore, one may well presume that it was a reasonable mode of election,

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election, and not attended with any prejudice or inconvenience to the general interests of the corporation; and though that cannot be taken into consideration in considering the effect of the second plea, because the facts stated in one plea, cannot be brought to bear upon the facts in another plea, so as to affect the construction of that plea, yet one may at all events put a supposition that such a mode of election might exist before the charter. It may be said that the rule laid down in the case of corporations does not extend to burgesses, but only to the higher corporate offices, and the language of the resolution is only applied to them. But the same reason applies to burgesses that does to the higher offices of the corporation, and there is even a still stronger reason for avoiding popular tumult and confusion, because the election of burgesses is of more frequent occurrence than that of the higher officers. The case of *Rex v. Head* (a) was that of the election of a burgess, and no distinction was made between a burgess and any superior officer of the corporation. The *King v. Bird* (b) was the case of a burgess, and no distinction was taken by the Court between him and other officers. The point was noticed in the argument, but not in the judgment. It has been held indeed, as appears by 4th *Inst.* 48., that if the corporate body at large have a right to elect members of parliament, they cannot delegate that power to a select body; but that is because it is considered as for the benefit of the public that they should all have votes, and it is not to be compared to the case of the election of mayors and other officers of corporations.

If the bye-law be found inconvenient, the corporate

(a) 4 *Burr.* 2515.

(b) 13 *East*, 507.

body may repeal it by the same authority by which they made it; and, therefore, if any mischief be likely to arise they may correct it themselves. For these reasons I am of opinion that judgment must be given for the defendant on the third plea.

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HOLROYD J. As the Court concur in opinion upon the question as to the acceptance of the charter, and as I understood the judgment upon that point was to be delivered by the Lord Chief Justice, I shall confine my observations to the two questions raised on the demurrer to the third plea. The first question is, whether the power of making the bye-law in question was taken away from the body at large by the power of making bye-laws given by the charter to the select body, viz. to the mayor and common council?

The second is, whether (supposing the body at large to have jurisdiction to make bye-laws or regulations touching the mode of electing burgesses) this is a valid bye-law?

With a view to these two questions it is material to attend to the particulars of the third plea, as they stand admitted by the demurrer to that plea.

It appears by that plea, and must be taken to be admitted upon the demurrer to it, that the borough of *Chipping Wycombe* was immemorially an ancient borough, and that before and until and at the time of granting the charter of *Charles* the Second, the *burgesses* were a body corporate, by the name of the *mayor, bailiffs, and burgesses* of that borough, and that within the borough there immemorially had been, or of right ought to have been, and then still ought to be an indefinite number of burgesses of the borough; that King *Charles*

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Charles the Second, by his letters patent, dated 16th of *November*, in the 15th year of his reign, granted and confirmed to the said body corporate, the mayor, bailiffs, and burgesses, that from thenceforth for ever *one of the burgesses* to be elected in manner after mentioned should be the mayor. [It is to be observed, that this with what follows in the plea will shew that the *aldermen* were considered as still continuing to be *burgesses*, because the *mayor* was to be elected *out of the aldermen*, and yet the charter expresses that *one of the burgesses* to be elected in manner after mentioned should be *mayor*. And the *mayor* is directed to be *sworn* in before the last mayor, or in his absence before *the aldermen and the rest of the burgesses* present, and the like as to the bailiffs' oaths.] And two burgesses should be the bailiffs, and twelve men, inhabiting continually within the borough, should be aldermen, and that the mayor, bailiffs, and burgesses of the said borough (that is to say, the *body corporate*, consequently including the aldermen) *and their successors*, or the major part of them, might elect such other men inhabiting or not within the borough, as to them should seem expedient to be burgesses. Then the plea states that by the charter the king granted and confirmed "to the said mayor, bailiffs, and burgesses of the said borough" (that is to the whole body corporate, consequently including the aldermen), "and their successors, that the aforesaid aldermen and bailiffs and their successors should be the common council of the borough, and should be assisting and aiding to the mayor in all matters and causes touching and concerning the borough aforesaid," then "that the king granted and confirmed to the aforesaid mayor, bailiffs, and burgesses of the borough aforesaid (that is to say, to the whole body corporate, including the aldermen) and their successors, that

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the *mayor, aldermen, and bailiffs* of the borough aforesaid, and their successors for the time being, or the major part of them, of whom the mayor to be one, should have power and authority to make such reasonable bye-laws as to them should seem good for the purposes therein mentioned." Those purposes are : for the good rule and government of the burgesses, artificers, and inhabitants of the borough, and for declaring *in what manner and order* the mayor, aldermen, bailiffs, and burgesses, the artificers, inhabitants, and *residents* of the borough should behave themselves in their offices, mysteries, and business within the borough and the limits thereof (i. e. how these several officers and persons, and not how the *body corporate* itself shall behave or act, or what it shall do) and otherwise for the further good and public advantage, and rule of the said borough (not touching or concerning the *body corporate* itself, or the government of *itself*, or the exercise of *its* powers) and the victualling of the same borough, and also for the better preservation, government, disposition, &c., of the possessions, &c., of the mayor, bailiffs, and burgesses (that is to say, the *body corporate*), and their successors, and other matters and causes whatsoever, touching or concerning the said borough, or the state, right, and interest of the said borough, with power to the *body corporate* (i. e. to them and their successors), by the mayor for the time being, and the bailiffs, and aldermen being the common council, or by the major part of them as aforesaid, to assess reasonable pains and fines upon the delinquents.

The plea goes on to state that the charter then appointed one person therein named to be the first mayor, two other persons therein named to be the first bailiffs, and twelve other persons to be the first twelve aldermen.

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(The learned Judge then stated the mode of election of mayor, bailiffs, and aldermen as set out in the pleadings.) The plea then avers, that the letters patent were duly accepted by the then mayor, bailiffs, and burgesses of the borough aforesaid. That after the acceptance of the said charter, and before the defendant's election, to wit, on 1st December 1675, the then mayor, bailiffs, and burgesses duly made a *bye-law*, not now extant in writing, for the better government of *the borough*, touching and concerning the election of future burgesses, in order to avoid popular confusion and disorder in such election. The bye-law was, that *the mayor and common council* of the borough, or the major part of them duly assembled together for that purpose within the borough, should, by themselves, and without the concurrence or assistance of *the rest of the burgesses*, elect such persons to be burgesses as to them or the major part should seem meet, which bye-law has been since constantly kept, and is still in full force. Then the plea states defendant's election to be a burgess by the mayor and the major part of the then common council duly assembled within the borough pursuant to the bye-law, and his being sworn in, et eo warranto, executing the office of one of the burgesses.

On the demurrer to this plea, the above two questions arise. The first is, whether the power of making the bye-law in question is taken away from the body at large by the power of making bye-laws given by the charter to the select body, viz. to the mayor and common council. This power of making the bye-law in question is not, I think, thus taken away from the body at large. The bye-law in question, if it had been made by the *select body*, to whom a power of making bye-laws is thus given by this charter, would be invalid

invalid on the principles laid down in *Rex v. Spencer* (a), and *Rex v. Cutbush*; the select body not for this purpose representing the body at large, and the select body thereby would be taking a privilege away from others, and narrowing and restraining it solely to themselves. In *Rex v. Spencer*, common councilman of *Maidstone*, it appeared that the town of *Maidstone* was incorporated by charter of the 21 G. 2., by the name of mayor, jurats, and commonalty, to consist of a mayor, thirteen jurats, (including the mayor) and forty common councilmen. And power was granted to the mayor, jurats, and common council to make bye-laws; but the election of common councilmen was by the charter to be by the mayor, jurats, and commonalty, or the major part of them; that a bye-law of the 18th August 1764, made by the mayor, jurats, and common council, gave that right to the mayor, jurats, and common council, and such common freemen as resided in and had served for a year as churchwarden and overseer for the town and parish of *Maidstone*, or the major part of them. It was held (there being other objections to the bye-law,) that such a bye-law affecting and narrowing and restraining the rights of the body at large could not be made by the select body, notwithstanding the power of making bye-laws was given them by the charter; not being for that purpose the representatives of the whole community, they could not assume to themselves what belonged to the body at large; but Lord Mansfield says, "Where the power of making bye-laws is in the body at large, they may delegate their right to a select body, who become the representative of the whole community." So in the present case I think that though the power of making bye-laws for particular

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purposes, or even in general, was a select body, yet if by reason thereof in the present case, be exercised account of the rights of others, incidentally in the body at large, by a bye-law made by common council, to gate their right of the election of the body, being a part of themselves, could if the power either for the general of making bye-laws has been in the select body, but had been wholly in the body at large, more especially if, as in the present case, the law cannot in any instance be carried into effect without its being thereby confirmed by the select and common council, to whom the power of making bye-laws is expressly given by the charter. *Cutbush (a)*, common councilman, by a bye-law appeared to have been made by the select jurats, and common council, transference of common councilmen from the commonalty, to the mayor, jurats, and commonalty as should be of the commonalty as *others* of the commonalty who were *common freemen* for the time being, *them*; the question was, whether the bye-law was good, and it was held to be bad, as being against the intent of the charter, and by which the corporation, to deprive the residents of the corporation without their consent. And *Yates v. Attorney-General* of corporations, 4 Co. 77 b. the question in question did not vary the conclusion, the ground of that resolution was, that

(a) 4 Burr. 224

common assent. But a bye-law made by a part of the corporation to exclude the rest without their assent, is not good." In the present case, the power in the body at large of making the bye-law in question, which, but for the power of making bye-laws given to the select body, would be incidentally in the body at large (supposing the bye-law not objectionable on any other ground), and the power of making this bye-law (which the select body could not make) remaining, therefore, in the body at large, notwithstanding the power of making bye-laws given by the charter to the select body, is not, as it seems to me, inconsistent with the power of making bye-laws, expressly given by the charter to the select body; and upon principle I think that this incidental power is not taken away from the body at large in cases where it cannot by law exist in or be exercised by the select body, except so far as the continuance of this power in the body at large would be inconsistent with the express power given to the select body. In *Haddock's case* (a), it appears that the antient powers and privileges of a corporation continue to exist, and are not merged or extinguished by a charter. That was the case of a return to a mandamus to restore him to the office of alderman. The return was, that he had been removed under a prescriptive power which had existed previous to the charter of 19 *Car. 1*. The Court all held this return good, for though by the charter of *Charles 1st*, there is no power given for the corporation to remove an alderman, yet when the consiliari, alias aldermanni, were before the said charter, removable for reasonable cause, the same power still remains, for that

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the charter doth not merge or extinguish any of the ancient privileges, but the corporation might use them as before; and if it were otherwise, it would be very mischievous to most of the corporations in England, who have taken new charters, but were ancient corporations before.

This I apprehend to be the law, unless where the charter vests a prior ancient existing power or privilege elsewhere than where it was before, or varies it as in the case on which one of the questions on the other pleadings has arisen.

The same principle had also been adopted and applied in a former case of *Hicks v. Laurenceston* (a) in E. 3 Car. 1., to the case of an election. There it is said "if the king create a corporation of a mayor and eight aldermen, with a clause that upon the death or amotion of any alderman, it should be lawful for the mayor and the rest of the aldermen, *within eight days* next after such death or amotion to elect another alderman in his place, although there be no election within the eight days, yet they may elect an alderman at any time afterwards, for they have a power to elect another *as incident* to the corporation created. For anciently corporations had no such clause giving them power to elect, *and this affirmative power does not toll the implied power incident to the corporation.*" So I say in the present case, the affirmative and express power, given by the charter to the select body, of making bye-laws, does not toll the implied power incident to the corporation in cases in which the affirmative express power cannot by law be exercised by the select body, or to which it does not extend, but that the same principle which in those cases, the one of re-

(a) 1 Roll. Abr. 513. th. Corporation, G. pl. 5.

removal, the other of election, continued pre-existing incidental powers of removal and election by reason that the charters did not take them away or annul them, will, in my opinion, in the present case continue in the body at large their incidental power of making bye-laws in such cases, and so far as it cannot in law be vested in the select body, or as it is not by law vested in such select body. And the very reason given in 1 *Roll. Abr.* 513., *Corporation G.*, pl. 4., for the power of making bye-laws being incident to a corporation, and included in its incorporation, viz. "for a body politic cannot be governed without laws," and that "they ought always to be subject to the law of the realm as subordinate to it," applies to the continuance of such incidental power in the body corporate at large upon subjects and in cases to which the power expressly given by charter does not, in fact, or cannot by law apply. Lord *Mansfield*, indeed, in *Rex v. Head and four others* (a), freemen of *Helston*, affirmed in *Dom. Proc.* (b), is stated to have said "The body at large had no power to make bye-laws, because that power was by the charter given to the common council, consisting of the mayor and aldermen. And the common council could not by a bye-law take away from the body at large the right of election which the charter had vested in the whole body." Lord *Mansfield* adds, "This is exactly the case of *Maidstone*." But that dictum was quite extrajudicial, and the case was determined on another ground, that the bye-law then in question was not made by the body at large, but only by the mayor and aldermen, though with the assent of the commonalty, but those words

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(a) 4 Burr. 2515.

(b) 6 Bro. P. C. 511.

the particular occasions and for the particular purposes," would be rendered useless and inoperative. The case of *Child v. The Hudson's Bay Company* (a) is applicable to this point. The *Hudson's Bay Company* were by charter incorporated and empowered to make *bye-laws* for the better government of the company, and for the management and direction of their trade to *Hudson's Bay*. Lord Macclesfield says, "A corporation has an implied power to make bye-laws, but where the charter gives the company a power to make bye-laws they can only make them in such cases as they are enabled to do by the charter; for such power given by the charter implies a negative that they shall not make bye-laws in any other cases. Thus where the company in the present case have a power given them by the charter to make bye-laws for the management of their trade to *Hudson's Bay*, this power implies a negative that they cannot make any other bye-laws; à fortiori they cannot make bye-laws in relation to projects and insurances which by act of parliament (statute 6 G. 1. c. 18.) are declared to be illegal." It may be observed, too, that the bye-law gave the company a lien on the stock, in the company, of any member who should be indebted to the company. And they applied this bye-law to pay the debt of a member claimed to be due to them on a project by them of insurances on marriages and apprentices. This rule of construction, therefore, evidently is because of the implication that it was the grantor's intent that the power of making bye-laws thus given, whether to a select body or to the body at large, should be confined to the particular occasions and purposes expressly mentioned, and because otherwise the restraining words

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(a) 2 P. W. 209.

proposing, seconding, discussing, voting, and determining the same), as being virtually excepted out of the general power otherwise given of making bye-laws. It is I think a power inherent in and incidental to the right of election, and binding on the body having that right, until the bye-law be revoked, notwithstanding the general power of making bye-laws be vested in a different body, otherwise that incidental power would be thereby entirely taken away, even though the bye-law be adopted and confirmed, which is indeed no more in effect than the present case, by the very body (the mayor and common council) to whom the power of making bye-laws is expressly given; for the bye-law has been adopted and in effect confirmed by the mayor and common council by their acting under it at their elections, as the bye-law is on the pleadings admitted to have been ever since the making of it constantly kept and observed by the body corporate; so that it is a bye-law made by the whole body corporate, regarding their rights, the exercise of which they alone can have the power to regulate, and with which no other body has a right to interfere, and adopted and confirmed by that very body, to which alone the power of making bye-laws is expressly given.

The next question then is, whether (supposing the body at large to have jurisdiction to make bye-laws or regulations touching the mode of election of burgesses) this is a valid bye-law. On this question let us see the previous state of the corporation, and the effect of such particulars of the charter to be applied thereto as more particularly regard this question, and as they are to be collected from those pleadings upon which this question arises.

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By the third plea it appears that the charter was not one creating for the first time a new corporation, but granted to the then existing corporation of an ancient *prescriptive borough*, having a right by prescription to an indefinite number of burgesses; that this body corporate, and also its corporate name, comprise not only the different parts of mayor, bailiffs, and burgesses, but also the aldermen, though not *nominally* expressed in the corporate name. That all these parts or offices are taken out of the burgesses at large originally, and that all the members thereof continue in consideration of law to be burgesses, although they are clothed with *additional* powers as *principal* burgesses, and with superior names of office, as mayor, aldermen, bailiffs, in respect of their executing the particular functions of those respective offices, with regard to which functions they may become respectively distinct integral parts of the body corporate, as contradistinguished from each other, as well as from the burgesses at large, but they may have to execute other functions, not as distinct integral parts, but as distinct individual members only of one whole, to wit, of the whole body corporate.

The king ordains by the charter, that thenceforth for ever one of the *burgesses* should be *mayor*, and two *burgesses* bailiffs, and though he describes the twelve aldermen to be *men* (not saying burgesses) inhabiting continually within the borough, yet it appears by the charter that all the future elections of aldermen are to be out of the *burgesses*. So that the king's declared will is, that all these officers shall be taken mediately or immediately out of the *burgesses*, to wit, the aldermen and bailiffs out of the *burgesses* immediately, and the mayor out of the aldermen, that is to say, out of burgesses, who have also
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become aldermen; and it appears by the charter that no third person or body of men have any thing to do in the election to those higher offices, the election of mayor being by the integral parts of mayor and aldermen, bailiffs and burgesses; the bailiffs by those of mayor, aldermen, and bailiffs, and the aldermen by those of mayor and aldermen. This would more strongly appear by the charter as enrolled in the rejoinder to the special replication to the first and second pleas, than it does by the parts of the charter stated in the third plea, as the first mayor, aldermen, &c., by the charter as so enrolled appear to have been all either in the same offices at the time of granting the charter, or else burgesses.

The election of burgesses is by charter to be by the whole body corporate (a), as one body (not by different integral parts), the individuals of which whole were to act as members of the whole (viz., as burgesses), not as members of integral parts; the doctrine of integral parts does not apply, the duty of each is as one of a whole, the same duty in such election belongs to each. The bye-law narrows it to be exercised only by a particular part instead of by the whole, viz., by certain principal burgesses, as in the case of corporations in *4 Coke*. An election by those principal burgesses at a meeting duly assembled for that purpose, if the bye-law be a valid one, is in law, so long as that bye-law remains in force, an election by the whole body corporate which they represent, and an election by the major part of those principal burgesses so duly assembled is in like man-

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(a) Vide ante, p. 808.

baillifs, and burgesses, as a gift to integral parts, would not include the whole body, unless the aldermen be included among the burgesses, or it would not extend to the aldermen, as included in any of those integral parts, except it be the burgesses. And if the power of electing burgesses in the present case is to be deemed to be given to integral parts, those integral parts, I think, are the mayor, the baillifs, and the burgesses (the aldermen being included in the burgesses, as being persons who are also burgesses.) If so, the bye-law in question does not strike off any integral part, for it leaves the mayor, the baillifs, and each of the burgesses as are also aldermen, and it is not, therefore, on that account void. But, supposing that it must be deemed that the bye-law does in effect strike off an integral part of the electors, viz., the burgesses, yet if the above doctrine in the *Maidstone* cases (which it is to be observed was unnecessary to the determination of those cases, and extra-judicial, though I do not dispute that doctrine when properly qualified), be confined to cases where the right of election is by the charter given to integral parts as such, whether comprising or not comprising the whole (and I think that doctrine must be so confined), it may be correct. Indeed in *Newling v. Francis* (a), Lord Kenyon says, "If the bye-law does not exclude those persons who were intended by the king's charter to concur in the election, or does not narrow the number of persons eligible, it may be good." He immediately adds, "a bye-law cannot indeed exclude integral parts, as was decided in the *Maidstone* case, but generally speaking within these bounds the mode of election may be regulated by pro-

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(a) 5 T. R. 189.

would have been sufficient to have transferred the power from the body at large to a select part of it." But Lord *Ellenborough* in *Rex v. Bird* (c) observed, "that no authority was referred to by Lord *Kenyon* for the doubt expressed by him." And all the cases, both those before and since these dicta of Lord *Kenyon*, form a sufficient authority, I think, to remove the doubt. And the reasonableness and beneficial effects of such a bye-law seem to be confirmed by the practice and opinions of numerous bodies of men, though not bodies corporate, especially in matters that much concern their own interest, or the public good, or in matters requiring sound discretion, when, in order to act most advisedly, and most discreetly, and most beneficially, they refer the matter to the consideration and discretion of a committee composing a smaller body, appointed by and from amongst themselves.

The first case is the case of *Corporations*. (b) In that case "it was demanded of all the judges, that where divers cities, boroughs, and towns are incorporated by charters, some by the name of mayor and commonalty, or mayor and burgesses, &c., or bailiffs and burgesses, &c., or aldermen and burgesses, &c., or provost or reve and burgesses, or the like; and in the said charters it is prescribed that the mayor, bailiffs, aldermen, provosts, &c., shall be chosen by the commonalty or burgesses, &c., if the ancient and usual elections of mayors, bailiffs, provosts, &c., by a certain selected number of the principal of the commonalty, or burgesses commonly called the common council, or by such like name, and not in general by the whole commonalty or burgesses, nor by

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(a) 13 *East*, 379.(b) 4 *Co.* 77 b. in *Mich.* 40 & 41 *Eliz.*; *Jenk.* 273. S. C.

shewn, yet it shall be presumed and intended in respect of such special manner of ancient and continual election (which special election could not begin without common consent) that at first such ordinance or constitution was made, such reverend respect the law attributes to ancient and continual allowance and usage, although it began within time of memory." Afterwards Lord Coke adds: "And according to this resolution the ancient and continual usages have been in *London*, *Norwich*, and other ancient cities and corporations, and God forbid that they should be now innovated or altered, for many and great inconveniences will thereupon arise, all which the law has wisely prevented, as appears by this resolution."

The doctrine in the *Maidstone* cases, as to a bye-law excluding an integral part of the electors, would apply to the question here put to the judges in the case of *Corporations*, if it be not to be qualified in the way I have above suggested, and is no more applicable to the present case than it was to that case in *4 Coke*, and yet notwithstanding that doctrine in those *Maidstone* cases, the case of *Corporations* was not disputed in the *Maidstone* cases, or in any of the cases that I have seen, which were determined before or since the *Maidstone* cases, except so far as that case may be considered to have been questioned by the doubts thrown out by Lord Kenyon.

The case of *Corporations* related to the election of mayors and other principal officers of corporations, which are not less important than the elections of freemen or burgesses, but the principle and rules have been since laid down generally, and have been applied to the election of freemen or burgesses, as well as to the election of their principal officers.

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may make a bye-law to vest the power of election in any select number, yet here the question being whether there is such a bye-law the Court cannot grant that on motion, but it must be tried." (He then cited the special verdict in the case of *Brecknock*, finding a very long usage, but not finding a bye-law, where judgment was given against the defendants); and then said, "no usage how long soever in case of a corporation by charter can support an election made otherwise than according to the records of the charter, unless the jury find that there was a bye-law for that purpose, *though possibly it may be otherwise in case of a corporation by prescription.*" Afterwards, in *Rex v. Spencer (a)*, and *Rex v. Cutbush (b)*, which are also *Maidstone* cases, the general point was considered as settled.

These last two cases recognize the power of the whole body to narrow the number of the electors, but with the restraints against requiring qualifications that are dependant upon the means or interference of others, and against leaving out any integral part.

Then followed the cases, *Rex v. Ashwell (c)* and *Rex v. Bird (d)*. (The learned Judge then stated those cases (*e*) very fully, and proceeded.) They are in point on this question, except that the former election was of a superior officer of the corporation, an alderman, but the latter was on an election, as in the present case, of a burgess. They narrowed the exercise of the power of election to a part of the burgesses themselves, namely, those principal burgesses, &c., mayor, aldermen, &c. who had become so out of the general body of the burgesses, and to certain other burgesses elected by the

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(a) 3 Burr. 1827.

(b) 4 Burr. 2204.

(c) 12 East, 22.

(d) 13 East, 367.

(e) See P. 804.

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body at large, without the interference of any persons but the burgesses or persons derived out of them.

It is a delegation *pro tempore* (that is to say, until revoked by themselves) to a part, and an adoption of persons elected under such a delegation to a part of themselves, and virtually, therefore, until their bye-law is revoked, an election by the whole body (in consideration of law) by reason of the above authorities.

Altering the proportions of each or any of the different parts (considered even as integral parts, as was done in those cases) may have as great an effect and may be in effect as great an alteration and change of the right and power of election, and as much at variance with the king's grant, as leaving out the whole of an integral part; and yet a bye-law working such an alteration and change, without omitting an integral part, may, according to all the cases, be a valid bye-law.

But as the charter, as I think I have before shewn, clearly considers and names the aldermen as being still, although aldermen, a part of the burgesses, it is this consideration which makes the above last two cases completely in point on this question about an integral part (*sc.* the burgesses), the delegation by the bye-law being to the mayor, bailiffs, and part of the burgesses (*sc.* the aldermen), though exclusive of the rest of the burgesses.

In the above case of *Rex v. Bird*, which arose, as in the present case, upon the election of a burgess, a distinction was taken in argument between the elections of the principal annual officers of corporations, as mayors, bailiffs, &c., and the elections of burgesses, and it was contended, that the right of restraining the number of electors was confined to the elections of the former, and
 was

was not meant to be extended to the latter; but no such distinction between burgesses and annual officers, nor any distinction in that respect was taken in any of the prior cases between the election of burgesses at large and that of other corporate officers, whether annual or for life, although several of those cases arose upon the election, not of annual officers, but of principal officers for life, such as aldermen, common councilmen, &c., and particularly in the above case of *Rex v. Ashwell*, where the bye-law was established, and in *Rex v. Head and Others*, upon the election of burgesses, where upon other grounds the bye-law was held invalid; but notwithstanding such distinction was urged in *Rex v. Bird*, the Court immediately decided (a) against such distinction as a matter upon which they had no doubt, and afterwards adverted to and confirmed that decision (b) when their judgment was delivered upon another point on which they took further time for consideration. And the same mischiefs and inconveniences in the avoiding of popular confusion are prevented by such bye-laws, when they are applied to the elections of burgesses, as well as when they are applied to the elections of the principal officers, whether permanent or annual, to both of which kinds of principal officers the rule was expressly applied in the case of *Corporations*, in 4 *Coke's Reports*.

If it be said that the bye-law might have been obtained by the common council having been a majority of the corporation at the time of making such bye-law, and against the consent of all the rest of the burgesses; and that the common council might, by a forbearance of the exercise of their power of the election of freemen, keep up such a majority in themselves so as to prevent

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a repeal of the bye-law, and thus continue the right of election against the consent of the rest of the corporation, the former part of this objection would apply equally to the instances put in the above *Case of Corporations* in 4 *Coke*, and the other cases, where the validity of such a bye-law has come in question.

But it is not to be supposed, that in a corporation consisting of an indefinite number of burgesses with a common council for their government, and for that of the town, that the common council who are to advise and consult, and not the burgesses at large, are the main body, or the majority, or that where the right of electing burgesses is in the burgesses at large, the burgesses at large would ever suffer themselves to become the minority, while they keep the power of election in themselves previous to the bye-law, or would not repeal it if they saw their power to repeal the same endangered by the common council disusing the exercise of their power of electing freemen, in order to obtain a majority in themselves, and thereby prevent a repeal of the bye-law. The burgesses in general must, at the first, be taken, I think, to be the main body of such a corporation; if so, their power of making or refusing the bye-law, and their power of repealing it, will continue in themselves, unless by their own neglect or default, and it is a probable circumstance or inconvenience only, and not a possible one, according to the doctrine in *Rex v. Bird*, that will form a sufficient objection to a bye-law. But it is to be recollected, that such a bye-law to be valid must, according to *The case of Corporations* in *Coke*, be "by their common consent," and according to the *Colchester* case in *Bulstrode*, "by the common consent of all;" and whatever may be the true import of those expressions, and whatever consent may

be requisite to give validity to this bye-law, whether it be an unanimous consent or the consent of a majority, such a consent must, I think, upon this demurrer, be taken to have been given to the making of this bye-law.

Upon these grounds I think this is a valid bye-law, and that there must be judgment for the defendant upon the demurrer to the third plea.

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BAYLEY J. I shall not go over the ground which has been so ably discussed by my Brothers *Littledale* and *Holroyd*, except on the point in which my opinion differs from theirs, and that is upon the validity of the bye-law of 1675. I shall confine myself to the question as to that bye-law. It is material to see of what the corporation consists, because part of my objection to the bye-law in question depends on the making such a bye-law as this in such a corporation as this. This is a corporation consisting of a mayor, two bailiffs, twelve aldermen, and an indefinite number of burgesses. No inchoate right in any body is stated, no right by purchase or by servitude; nor any thing except the choice of those persons who, from time to time, are chosen under the charter. This is a bye-law, not for regulating the election of a head officer, not for regulating the election of any of those persons who of necessity must fill specific offices; but it is for the election of the indefinite body of burgesses; and, therefore, virtually vests in the persons (in whom this bye-law did vest the power) the decision of saying of what number the corporation shall from time to time consist. I consider it to be a very different thing, whether a bye-law is to say who shall fill the specific office, when that specific office must be filled by somebody, or to say

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who shall be a common councilman, when the office of common councilman must be filled by somebody who is a member of the corporation, and a bye-law saying of what number the corporation shall consist; that it shall vest in a select body, not the power of saying who shall fill the office, but of saying if the indefinite body shall consist of five, ten, fifty, five hundred, or any other number. But before I discuss this point upon its merits, I will consider the authorities, because unless they admit of the distinction I have mentioned, it may be too late to introduce it now. In the case of *Corporations* (a), the question put was, as to the election of mayors, bailiffs, and provosts, &c. and the resolution was that a bye-law, that the mayor or bailiffs or other *principal officers* should be elected by a selected number of the principal of the commonalty or burgesses, would be good. This applies to the principal officers only. In 3 *Bulstrode*, 71. there is a note by *Coke C. J.* and the whole Court, that if there be a popular election of the mayor and aldermen, and this breeds confusion, this may be altered by their agreement, and by the common assent of all to have their election made by a fewer number, but not otherwise. In the passage in *Hobart*, 15. it is said, that when there was a corporation made by charter, and by the same an ordinance that the provost and burgesses only should choose members of parliament, (he is speaking not of a bye-law, but of an ordinance by the king, as the preceding paragraph shews,) the law will vest this privilege in the whole corporation in point of interest, though the execution of it be committed to some persons, members of the same corporation. The pre-

(a) 4 Co. 77 b.

ceding paragraph states, that the king may ordain that such a place may send members to parliament, and in an unincorporated place such liberty could not commence by grant, but by ordinance, as the king may erect a fair, &c., or the like by ordinance, without granting it unto any other. In 4th *In st.* 48 & 49, Lord Coke speaking of such bye-laws as good in the case of mayors, bailiffs, &c., and bad in the case of elections of members of parliament, says, "If a city hath power to make ordinances, they cannot make an ordinance that a less number shall elect burgesses for the parliament than made the election before; for free elections of members of the High Court of Parliament are pro bono publico, and not to be compared to other cases of election of mayors, bailiffs, &c. of corporations, &c." The case of *The Queen v. Larwood* only shews, that as to the office of sheriff it is absolutely necessary that some person should fill it. In *Rex v. Tomlyn (a)*, the bye-law was for the election of jurats of *Maidstone*, and there was no decision upon it. In *Rex v. Spencer (b)*, (where, however, the bye-law was held bad) it was confined to the election of common councilmen of *Maidstone*. In *Rex v. Cutbush (c)*, (where it was also held bad, the bye-law was confined to the common councilmen of *Maidstone*. *Rex v. Head (d)*, where the bye-law was held bad, because it was only with the assent of the commonalty, without their joining in it, is the first case I find of a bye-law for the election of burgesses to limit the number of electors. In *Newling v. Francis (e)* the bye-law applied only to the election of mayor. In *Rex v. Ash-*

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(a) *Rep. Temp. Hardw.* 316.

(b) 3 Burr. 1827.

(c) 4 Burr. 2204.

(d) 4 Burr. 2515.

(e) 3 T. R. 189.

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well (a) the bye-law only applied to the election men. In *Rex v. Holland* (b) the corporation of an indefinite number of freemen, and a charter by which the burgesses, till a given time until the time of *Jac. 1.*, and the common council afterwards were used to admit and swear in such as they should think fit, Lord *Kenyon* observed this gave the power to a select body, without charter granting them such a power, or even a charter to that effect. He then says, "Not that I am disposed to say that such a bye-law, if it had been would have been sufficient to have transferred power from the body at large to a select body." Lord *Kenyon* had a most powerful mind, and was particularly alive to every question of corporation and he may in that case have had in his mind the distinction between filling up an office which must be done up by some person, and delegating the right of what number an indefinite body should do so. In *Rex v. Bird* (c), the right of electing burgesses by a bye-law of 1606 transferred from the body at large to a select body, and that bye-law was good; but there that was not the only supply of burgesses, the eldest son of every burgess born in *Nottingham*, the younger sons of freemen serving an apprenticeship, whether in *Nottingham* or not, and every person serving an apprenticeship in *Nottingham* to a freeman intitled at twenty-one to his freedom, and stated to be, fully to secure and provide for the maintenance of a sufficient and large number of burgesses, w

(a) 12 East, 22.

(b) 2 East, 70.

(c) 13 E.

addition of any burgesses by election. So that the mischiefs which may result, and are likely to result from this bye-law in this borough, were not likely to result there. *Dampier* in his argument mentioned Lord *Kenyon's* doubt in *Rex v. Holland*, and noticed that the right to restrain the number of electors seemed to have been confined to the principal annual officers of corporations, as mayors, bailiffs, &c., and was not meant to be extended to the general body of the corporators. But that case did not admit of the strong observations which apply to this, of the tendency of the bye-law to keep the number of ordinary freemen below the number of the select body, and to cut off from the freemen the power of repealing it; and though the Court held the bye-law good, they had not under their consideration all the objections which are applicable here. Although that case, therefore, is an authority to a certain extent in favour of bye-laws of this kind, it does not appear to me to go any thing like the length the bye-law in question does, and that it is still competent to us to examine upon principle the validity of this bye-law, and upon principle I am of opinion that this bye-law is bad. Objections to the bye-law must be founded either upon the general want of power in the persons who made it, or, secondly, upon the nature of the bye-law itself, and their want of power to make such a bye-law. My objection to the bye-law is founded upon the latter ground, and I think it bad, first, because it varies the constitution of the borough; secondly, because it has a direct tendency to keep the number of common burgesses low; and, thirdly, because in addition to the question of interest in many of the members who concurred in making it, it might originally have been made and since have been continued against the votes in the first

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first instance, and the inclinations since of every member of the corporation, except those interested persons; and because none of the authorities I can find (except *Rex v. Bird*) go further than to limit the number of electors upon the election of officers of the corporation, whereas this bye-law has a tendency to vary the numbers which shall constitute the body corporate. A bye-law to regulate the election of an officer who must exist, or of any member of a definite body, is very different from a bye-law to affect the question, whether additional members shall exist or not. A bye-law to regulate necessary elections where the only question is, which of several persons shall fill a given office, leaves the corporation as it found it, it does not vary its component parts. A bye-law to regulate the question whether there shall be any and what number of new members has a direct tendency to affect the numbers and vary the component parts. Upon the one, the only point affected is, whether *A. B.* or *C.* shall be mayor. Upon the other, the question may arise whether there shall be five burgesses or fifty; whether the common burgesses shall outnumber the common council, or the common council the other burgesses; whether the common burgesses shall be of any importance or none. My first objection then to this bye-law is, that it varies the constitution of the borough. The charter says in substance, there shall always be such a number of common burgesses as the body at large shall think fit; the bye-law, that there shall be so many only as the common council, the fifteen, shall think fit. Is not this an alteration of the constitution of the borough? According to the charter, every burgess has a right to give his voice whether there shall be any addition of burgesses or not, whether there shall be an addition of five or fifty,

fifty, whether *A.* or *B.* or *C.* shall be one. The bye-law says he shall have no voice, that the right of judging shall be in the common councilmen, and in the common councilmen only. The charter makes the burgesses equal in this respect with the members of the common council; the bye-law annihilates them. The charter is for the benefit of all the burgesses of the place, the bye-law confines the benefit in this instance to the fifteen.

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Secondly, what is the natural tendency of such a bye-law as this as to the number of common burgesses? The bye-law gives the fifteen power, are they likely to keep it if they can? Have they the means? The corporation consists, as far as we are informed by the pleadings, of the fifteen, and of such common burgesses as they shall think fit from time to time to make. Had any other persons a right to be common burgesses by birth or servitude, or otherwise; and if the existence of such persons with such rights would obviate the legal objections which apply to the bye-law, upon the state of facts which the pleadings present, it was for the defendant who relies upon the bye-law to have stated it. The bye-law, as it seems to me, is to be considered upon the facts the record states. The corporation, then, consists of the fifteen, and of such common burgesses as they think fit. Whether there shall ever be fifteen or not is entirely in the option of the common council; and how, according to common experience, are they likely to exercise that option? Whilst the number of common burgesses is under that of the common council, the power is exclusively in the common council; the common burgesses are comparatively ciphers. This bye-law, then, has a direct tendency to keep the number of common burgesses below that of the common council
because

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because it is the interest of the common council, in whom the bye-law vests the power, that it should be so.

Thirdly. It is an anomaly, that in bye-laws like this the persons interested in taking power from others and vesting it in themselves should be allowed by law to vote upon the question whether it should be so taken away and vested or not. But how much greater the anomaly if it should be done by their own exclusive votes, and if their own votes should be able from time to time to prevent any future revocation of the bye-law, any restoration of the rights of which the common burgesses were deprived.

I ask then, with a view to that point, what was the number of common burgesses when the bye-law in question was made? Did it equal the number of the then existing common council? The record is silent upon this point. But if this be essential to the validity of the bye-law, it was for the defendant who brings forward the bye-law to have stated it. The bye-law might then have been made upon the exclusive votes of the members of common council against the vote of every common burgess. I ask again, with a view to the same point, what has been the number of common burgesses since the bye-law; has it ever equalled the number of existing common council? The record is silent upon this point also. The continuance of the bye-law, then, may have been against the wish of every person who has been a common burgess since the bye-law was made. It was said upon the argument, the body at large might at any time repeal the bye-law; but it was forgotten to be stated, that the common council might at all times have prevented it. The common council have only to pursue the system that interest would prescribe, to keep the number of burgesses be-
low

low the number of common councilmen, and the body at large will never have the power to repeal the bye-law. These reasons induce me to think, that in a corporation circumstanced as this is, a bye-law of this description, which is to vest in a limited number the power of saying of what number an indefinite body shall consist, is contrary to the spirit of the constitution of the borough, and is consequently bad; and that upon the demurrer to the second plea, there must be judgment for the crown.

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ABBOTT C. J. I agree with my three learned Brothers, in the opinion that judgment must be pronounced for the crown on the first part of this record; that is, upon the first two special pleas, and the subsequent pleadings arising on them. The reasons for that opinion have been sufficiently detailed by my learned Brothers, to render it unnecessary for me to say any thing further upon it.

Upon the second part also of this record two questions arise, first, whether the bye-law would be good, if the charter had contained no special power of making bye-laws given to the select body. And, secondly, whether by that special power so given, the power of making bye-laws, which would otherwise belong to the corporation at large, be taken away.

Upon the first of these questions I agree with my two learned brothers *Holroyd* and *Littledale*, and in the reasons given by them, which I think it unnecessary to repeat.

Upon the other question, whether the corporation at large had power under this charter to make this bye-law, I cannot forbear saying that I have very considerable doubt. The plea sets forth the charter of *Car. 2.*
and,

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and, among other matters, the clause relating to the power of making bye-laws. This clause is in broad and extensive terms. (The Lord Chief Justice read the power to make bye-laws, as set out in the pleadings.) Large, however, as these terms are, they certainly would not enable the select body to make a bye-law giving to themselves that power which by the charter is given to the corporation. This I admit, and I am aware also that generally at large of every corporation possesses in itself the power of making bye-laws, although not given by charter, and that the body at large alone possesses this power. This power is mentioned by Lord Coke in the case of *Sutton's Hospital* (a), among other things incident to the incorporation, but he speaks of it as requisite for good order and government (of the poor in that case) to the essence of the corporation. If then it be only for good order and government, and this is specially provided for, at least as to most parts, a power of the same nature, given to a part of the corporation, I doubt whether there be any sufficient reason for its existence in the body at large. Where power is given to a part, and the power is to the necessity of its existence somewhere, it is taken to belong to the body at large, because a select body can have no powers that are not given, or necessarily to be inferred from the object of its institution. The case then seems thus: a power is given to the select body to make laws upon all matters and causes touching the right, and interest of the borough. A matter proposed upon which this body cannot exercise the

(a) 10 Co. 31.

because by so doing they will take away from the body at large an authority given to them by the charter, and transfer that authority to themselves. Either the matter proposed must be left undone, or a power not mentioned in the charter must be called into existence and operation to accomplish it, the matter itself not being necessary, though it may be convenient. Which of these alternatives ought the law to choose? We have no decision to guide us. I doubt whether the law ought not to choose that which will leave the particular direction of the charter in full and literal force. A very extensive power of making bye-laws is given by the charter, and I doubt whether it may not be reasonably inferred from thence that the king did not intend that any bye-law should be made which did not fall within the scope and range of the power so given, and that all other powers were intended to be excluded by the express grant of this power, and that the power thus affirmatively given to one body carries with it a negative of all other powers to other bodies. It would be different if a power to make bye-laws on certain particular subjects were given to the body at large; for such a power would either be superfluous or cumulative. Superfluous if applied to such matters only as the body at large might do by the authority incident to them; cumulative if applied to matters to which the incidental authority would not extend. I wish, however, to be understood as expressing doubt only, and not pronouncing any opinion on this point.

Judgment for the Crown on the first two pleas.

For the defendant upon the third plea.

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Friday,
November 25th.

The KING against The Justices of Me
SHIRE.

Upon an appeal against an order of removal, the justices at sessions were equally divided in opinion upon a question of fact, on which the settlement of the pauper depended. The sessions thinking that it lay on the respondent parish to establish their case to the satisfaction of a majority of the Court, quashed the order of removal. The sessions having decided the case, this Court refused a mandamus.

Query, If the sessions ought to have adjourned, instead of quashing the order.

BY an order of two justices *John Williams* w from the parish of *Abergavenny* to the par *John the Evangelist*, in the borough of *Brecon* parish appealed; and the appeal was he *Michaelmas* sessions 1824. Upon the heari sions quashed the order. A rule nisi for a had been obtained on an affidavit stating, that at sessions were equally divided in opinion c and that thereupon the counsel for the app contended that they were bound to adjourn but that the sessions refused to do so, and q order. In answer to this there was an affid that, upon the hearing of the appeal, the cou appellants had insisted on two points, one of that the respondents had failed in proving that had resided forty days in the appellant parish, & chairman after the hearing had said that it mig venient to take the opinion of the justices on separately, because if the residence were not would be unnecessary to decide the other qu asmuch as the respondents must then at all that upon the question whether the forty days were proved, the justices were equally div having then taken into consideration what they ought to give, they determined, witho vision, to quash the order.

Scarlett and *Maule* shewed cause. Whether the decision of the sessions were right or wrong, this Court ought not to interfere by mandamus. But, secondly, the decision of the Court of Quarter Sessions was right. It is true that it is said in *Nolan's Poor Laws* (a) that "if the magistrates who have a right to join in the Court's determination, should be equally divided in opinion, no judgment can be given, but the appeal must be adjourned from sessions to sessions, if necessary, until a majority shall be of opinion either on one side or the other." And in the note (b) it is said, "This seems to be their bounden duty; for otherwise the Court will grant a mandamus to compel them to enter continuances, and hear the appeal at a subsequent sessions." *Bodmin v. Warlingham* (c), and *Rex v. The Justices of Westmoreland* (d), are cited in support of, but do not support these positions. In the former of these cases the justices were equally divided, and neither made an order or adjourned the appeal, and at a subsequent sessions quashed the order of removal, and this Court afterwards quashed the order of sessions, because it was made without adjournment. This is an authority only that a subsequent sessions has no jurisdiction over an appeal made to a former sessions, unless adjourned, but does not shew that if the former sessions had given judgment (though equally divided) against the order, that judgment would have been wrong, still less that this Court would have interfered by mandamus. In the *King v. Westmoreland*, the justices being equally divided, *neither gave judgment nor adjourned*, and on an application for

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shire.

(a) 2 *Nol.* p. 446. third edit.(b) 2 *Nol.* 446.(c) 2 *Bott.* 733.(d) 2 *Bott.* 734.

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a mandamus, though the Court intimated an opinion in its favour, nothing was done; but if a mandamus had been actually granted, that would only shew that the Court will compel the sessions to proceed to judgment in an appeal which they have begun to hear, and improperly refused to go on with. In the present case the application is to rehear and again pronounce judgment on a case in which one judgment has already been given. No instance of the kind can be cited: the Court is true will compel an inferior jurisdiction to entertain or to proceed on a case when they improperly neglect to do so, but they will not, upon an application for a mandamus, review a judgment actually given. When the sessions have given a judgment, this Court will never review that judgment on facts not appearing on the record, or stated by the sessions for its opinion. Supposing they were wrong, there is no more reason why this Court should grant a mandamus to them to rehear the case, than if their error had been as to any other point of law, such as mistaking a dissolution of service for a dispensation; in such cases it is clearly settled that this Court will interfere only upon a case reserved by the sessions. If it were otherwise, parties would always prefer making their own statements by affidavits, to asking the sessions for a case; and the discretion of the sessions to refuse a case would in effect be taken away. *Rex v. Leicestershire (a)* is a case in point against the application. But, secondly, when the nature of an appeal against an order of removal is considered, it will appear that the judgment of the sessions was right. In the House of Lords, if the House be equally divided on an appeal, or

(a) 1 M. & S. 442.

a writ of error, the respondent or defendant in error prevails. But then those are proceedings in which the same question has been determined in a contested suit between the parties in the court below, upon the same materials as are before the court of error, viz., the facts appearing upon the record; and in such proceedings the presumption is in favor of the party who is in possession of the judgment of the Court below. The proceeding before the sessions on an order of removal, though called an appeal, is of a totally different nature. It is in reality an original proceeding against the appellants. The question has never been contested before, and the materials before the sessions are not the same as those before the justices who made the order *ex parte*. The question which the two justices before had to determine was, whether the evidence produced, by the complaining parish officers, before them was sufficient to shew that the pauper was settled in the appellant parish. The question which the sessions had to determine was, whether the result of the evidence adduced by the appellants and respondents before them shewed the same thing. These questions are evidently different, one of them may be determined in the affirmative, and the other in the negative, and both determinations may be right. The determination, therefore, of the former in favor of the respondents, raises no presumption on the discussion of the latter against the appellants, who moreover ought not in justice to be bound even to the extent of having the onus probandi thrown on them by a proceeding to which they were no parties. Then if the hearing of an appeal be an original proceeding in which the respondent parish have to prove their case, it follows, that if they have not a majority of the Court in their

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Bodmin v. Warligen it was said by the court, that where the justices were equally divided in opinion, that was a sufficient warrant for the clerk of the peace to have entered an adjournment, and it was his duty so to have done.

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The Justices of
MONMOUTH-
SHIRE.

ABBOTT C. J. I think that the rule for a mandamus ought to be discharged. It appears that, in this case, the court of quarter sessions have given their judgment. This Court is not a court of error from that court; it may compel the court of quarter sessions by mandamus to proceed to hear and decide the appeal; but when they have so determined it, this Court cannot compel them to correct their judgment if it appear to be erroneous. It is unnecessary to say whether the judgment pronounced by the court of quarter sessions was erroneous or not, because we are of opinion, that even if it were so, we have no jurisdiction to compel them to correct it.

Rule discharged.

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Friday,
November 25th.

The KING against J. DUDMAN.

Indictment for perjury alleged to have been committed in an affidavit sworn before a commissioner of the court of Chancery, stated that a commission of bankrupt issued against the defendant, under which he was duly declared a bankrupt. It then stated that the defendant preferred his petition to the Lord Chancellor, setting forth various matters, and, amongst others, the issuing of the commission, that the petitioner was declared a bankrupt, and that his estate under the commission, and that, at the second meeting, one *A. B.*

was appointed assignee, and an assignment made to him, and that he possessed himself the estate and effects of the petitioner. It then stated, that at the several meetings before the commission the petitioner declared openly, and in the presence and hearing of the assignee to a certain effect. At the trial, the petition was produced, and it appeared that the allegation was, that at the several meetings before the commissioners the petitioner declared to that effect: Held, that this was no variance, inasmuch as it was sufficient set out in the indictment the petition in substance and effect, and the word "commission" was one of equivocal meaning, and used to denote either a trust or authority exercised, the persons by whom the trust or authority was exercised, and that it sufficiently appeared from the context of the petition set forth in the indictment, that it was used in the last sense.

INDICTMENT for perjury alleged to have been committed by the defendant in an affidavit sworn him before a commissioner of the High Court of Chancery. The second count of the indictment states that on the petition of *George Droxley* a commission of bankrupt was issued against the defendant, under which he was duly declared a bankrupt. It then proceeded to state, that afterwards, to wit, on, &c. at, & the said defendant did prefer his certain petition in writing, "in the matter of the said *John Dudman*, a bankrupt," to the Lord Chancellor, and in and by his said petition, set forth that the petitioner in *September 1821* purchased three horses of one *George Droxley* for 101 to be paid for in three months by a bill at two months that the petitioner accepted a bill for that sum, payable the latter end of *March 1821*; that before the bill became due, *G. Droxley* on the 17th *February* petitioned the Lord Chancellor for a commission of bankrupt against the petitioner; that a commission issued, and that *G. Droxley*, at the opening of the said commission, proved the said debt of 101*l.* The petition

then proceeded to state several other facts, each sentence beginning with the words, "that the petitioner," and among other things stated as follows: that on the 1st of *March* 1821, the petitioner was declared a bankrupt under the said commission of bankrupt, and his estate and effects were seized by the messenger under the said commission; that at the second meeting one *Thomas Budgin* was appointed assignee, and an assignment was accordingly made to him, and he possessed himself of the estate and effects of the petitioner accordingly; that at the several meetings before the *commission*, the petitioner declared openly, and in the presence and hearing of the said assignee, that the bill of exchange given for the debt due to the said *George Drowley* was not due at the time when he struck the docket; and that the petitioner had not committed an act of bankruptcy. The prayer of the petition amongst other things was, that the commission might be superseded. At the trial before *Graham Baron*, at the last assizes for the county of *Sussex*, the petition of *Dudman* to the Lord Chancellor was proved, and by that it appeared, that the allegation in the petition was, that at the several meetings before the *commissioners*, the petitioner declared openly, and in the presence and hearing of the said assignee, that the bill of exchange given to *George Dowley* for the debt was not due at the time he struck the docket, whereas the indictment alleged the declaration to have been made at the several meetings before the *commission*. The defendant having been convicted, appeared upon a former day in this term to receive judgment. A doubt was then suggested by the court, whether it sufficiently appeared, in the first count of the indictment, that the affidavit was sworn in the course of a judicial proceeding, and they directed that point, as well as the variance between the

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in the particular sentence he is spoken of as the *said* assignee, viz. the assignee appointed at the second meeting. Now, if the meeting at which the petitioner is stated to have made the declarations took place before the commission issued, they could not have been made in the hearing of the *said assignee*, viz. of the person who was appointed only at the second meeting. That meeting, therefore, could not be a meeting before the commission issued, but it may have been before the commissioners, or the persons joined in the trust or office. Besides, the word "that" is disjunctive, and therefore the matter of the petition is not set out continuously; and then a substantial variance will be fatal only to the particular sentence, *Rex v. Leefe* (a). But assuming it to be a substantial variance and fatal to the whole matter of the petition, (except the prayer,) the whole matter, between the allegation that a petition was preferred and the prayer, may be rejected, and then it will appear that a petition was presented, praying among other things, that the commission should be superseded, and that would be sufficient.

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 against
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ABBOTT C. J. This being a criminal case, it is sufficient if the defendant has been properly convicted on any one count of the indictment, and we are all of opinion that the second count was supported by the proof which was adduced at the trial. The objection is, that there is a variance between the petition set forth in the indictment and that which was given in evidence at the trial. Now, in a proceeding of this kind, it was not necessary to set out in the indictment verbatim the tenor of the petition; it is sufficient if it be set out truly in substance and effect. The petition, as set out

(a) 2 Campb. 134.

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in the indictment, purports, ings before the commission, the hearing of the said assign change given to *G. Drowley* f the time when he struck th gation in the petition which was, that at the several me sioners, the petitioner decla question is whether that is a *commission* is one of equivc either to denote a trust or a instrument by which the aut persons by whom the trust And if it may denote the p thority, we must collect from i in which the words " before and of the other parts of the used in that sense or not. T on the 1st of *March* 1821, th bankrupt under the said com his estate and effects were seiz the said commission ; that at one *Thomas Budgin* was appoi assignment was made to hi himself of the estate and eff then proceeds to state, that a fore the commission, the petit effect in the hearing of the s word *commission* as there use the commission itself, it wou meetings took place before an that is impossible, because i could not have made his dec the said assignee. Then, if ti

of the word *commission*, we must construe it in the other sense which it is capable of bearing, namely, as denoting the persons to whom the authority was given; and if it be so construed, there was no variance between the petition set forth in the indictment and that which was given in evidence. The consequence is, that there must be judgment for the crown.

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against
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Judgment for the Crown.

The KING *against* The Benchers of LINCOLN'S
INN.

Saturday,
November 26th.

IN *Michaelmas* term 1824, Mr. T. J. Wooller made an application at the steward's office of the Society of *Lincoln's Inn*, to have his name enrolled as a member of that society, and left a paper containing his name, &c., conformably to the regulations of the society. In *Hilary* term 1825 he received an official letter from the steward, informing him that his application to the society was rejected by the benchers. On the 27th *January* 1825, Mr. Wooller presented a petition to the society praying to be heard upon the subject in his own behalf. Not having received any answer to this petition, he, on the 9th of *April*, addressed a petition to the twelve Judges, as visitors of the inns of court, praying redress. On the 20th of *April* he was informed by a letter from the clerk to the Lord Chief Justice of the Court of King's Bench, that the Judges had no power to interfere in the matter. On the 17th of *May* he addressed another petition to the benchers of *Lincoln's Inn* collectively, and sent a copy of it to each individually, praying that an opportunity might be afforded him of being heard upon the subject of his former application,

The Court will not grant a mandamus to compel the benchers of one of the inns of court to admit an individual as a member of the society with a view to his qualifying himself to be called to the bar.

or

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against
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of LINCOLN'S
INN.*

or that the society would assign their reasons for refusing to admit him a member. He was subsequently informed by the steward that his second petition had been rejected by the council without any reason being assigned for such rejection. Mr. *Wooller* now made an affidavit of the matters before stated, and applied for a rule, calling upon the masters, treasurers, and benchers of *Lincoln's Inn* to shew cause why a writ of mandamus should not issue, commanding them to admit him as a member of their society for the purpose of qualifying himself to be called to the bar. The Court had intimated to Mr. *Wooller*, on a former day, that they thought they had no jurisdiction on the subject, and desired him to direct his attention to that point.

Mr. *Wooller* (in person) now admitted, that he had not been able to find any precedent precisely in point, but contended, that inasmuch as it was *prima facie* the right of every individual to be permitted to practise as a barrister, and that as he could only qualify himself to do by becoming a member of one of the inns of court, this Court ought, under the circumstances, to grant a mandamus, inasmuch as there was no other mode of redress. In the case of *The King v. The Benchers of Gray's Inn*, (a) this Court refused a mandamus to compel the benchers to call to the bar a member of the society who had complied with the usual requisites, but that was not on the ground that they had no jurisdiction, but because the applicant had another remedy, viz. by appeal to the twelve Judges. It may further be inferred from that case that if there had been no other remedy the Court would have granted a mandamus. In this case it appears that the twelve Judges have no juris-

(a) *Doug.* 339.

diction, and, therefore, if the Court do not interfere by mandamus, there will be no means of enforcing the right. In that case, Lord *Mansfield*, speaking of the society, says, "They are voluntary societies, which for ages have submitted to government analogous to that of other seminaries of learning. But all the power they have concerning the admission to the bar is delegated to them from the Judges, and in every instance their conduct is subject to their control as visitors." If this be not a case in which the twelve Judges can interfere, what other government can these societies be called upon to submit to, except that of this Court? The writ of mandamus is a writ calculated to afford a remedy for injuries for which there is no other prescribed mode of redress by law. If this Court has no jurisdiction, this consequence will follow, that the benchers may arbitrarily refuse to admit as a member of the society any individual who is under no personal disability, and thereby prevent him from practising the law as a barrister; which it is the right of every subject, willing to conform to certain regulations, to do. In *The King v. The Vice-Chancellor of Cambridge* (a), it was decided, that a mandamus lies to a university to restore to academical degrees, where there is no visitor. And in *The King and Queen v. St. John's College, Cambridge* (b), it was laid down, that the visitor was made by the founder, and was the proper judge of the private laws of the college, and was to determine offences against those laws; but that where the law of the land is disobeyed, this Court will take notice thereof, notwithstanding the visitor; and in this case the proper way to put it in execution is by this writ of mandamus.

1825.

The King
against
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of Lincoln's
Inn.

(a) *Str.* 557. *Ld. Raym.* 1354.(b) 4 *Mod.* 241.

1825.

**The King
against
The Benchers
of Lincoln's
Inn.**

ABBOTT C. J. I am of opinion that this no power to compel the benchers of this society to admit any individual to become a member of or to assign any reasons why they do not. There is not any instance where a mandamus applied for to compel any such society to admit a member. In *The King v. The Benchers of the Inn (a)*, Lord Mansfield, speaking of these societies, says, "They are voluntary societies." The "voluntary society" imports in it a discretion in the individuals composing it to admit or reject as they please. It is true, that the twelve Judges are visitors of the inns of court, but in that character they have jurisdiction only over actually admitted members. When Lord Mansfield said they were "voluntary societies which for ages have submitted to government," it is analogous to that of other seminaries of learning, and should be understood to have meant that they submit to the rules and regulations as they themselves ordain for the internal government of the society, but not to submit to any order of a foreign jurisdiction, or to receive persons whom they are to admit as members. As the party now applying to the Court were an admitted member of the society, and had acquired an inchoate right capable of being perfected, it is not fit for this Court (in the absence of any remedy) to interfere by mandamus in order to deprive that right; but if the particular society refuse to call a particular member to the bar, that is not by mandamus but by appeal to the twelve Judges. It has been argued, that every individual has a *facie* an inchoate right to be a member of on

(a) Doug. 339.

societies, for the purpose of qualifying himself to practise as a barrister. If that proposition were established there would be a sufficient ground for granting a mandamus, but I apprehend that there is no such inchoate right. It might as well be said that every individual had an inchoate right to be admitted a member of a college, in either of the Universities, or of the College of Physicians, or any other establishment of that nature. But supposing an individual were desirous to practise medicine in *London*, this Court would not grant a mandamus to compel the College of Physicians to admit him as one of their members, or as a licentiate. I think, therefore, that in this case we ought not to grant a mandamus.

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The King
against
The Benchmen
of Lincoln's
Inn.

BAYLEY J. I am clearly of opinion that this court cannot compel the benchers of the society of *Lincoln's Inn* to admit this individual to be a member of their association. A mandamus lies only where the party applying for it has a right to have a particular thing done, and where there is an obligation upon the other party to do it. Now, considering the nature and institution of this society, I think there is no duty incumbent upon them to admit as members of their society all who think fit to apply. I think that the benchers may by law exercise a discretion upon the subject. There may be a great difference between this case and one where a party has been admitted and suffered to incur expence for a length of time, and then applies to be called to the bar. In that case he has an inchoate right to be called to the bar. But then the remedy is not by mandamus, but by appeal to the twelve judges. Every individual, however, has not an inchoate right to be admitted a member of any of these societies. They make their own rules as to
the

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the admission of members; and even if it is so
preciously upon the subject, this Court can
remedy in such a case; because in fact there is
no violation of any right. This case is not
that of a college. An individual has no right
to be admitted a member of a college, and
obligation upon the college to admit him.
It has been shewn that every individual had an
right to be admitted a member of these associations.
There was an obligation in the latter to admit
that the party aggrieved had no other remedy
would follow that this Court would be bound
mandamus; but there being no such right in
in this case, I think there is no ground for
mandamus.

HOLROYD J. The only question is, whether
an individual has a right to insist upon being
a member of the society. I think he has no
right. All persons have not a right to be admitted
into a college. They must be approved of by the
society or by those to whom the college has delegated
the power of exercising a discretion as to the persons
to be admitted. I think that no person has a right to be
a member of one of these societies unless he be
admitted by the society, or by those persons who are
authorized to exercise the discretion on behalf of the society.

LITTLEDALE J. I am of the same opinion.
These are said to be voluntary societies sub
ject to government, that must be understood to in
volve a submission to a government to be exercised
by the members of the society. In all the cases
which come before the Judges, the persons applying

themselves members of the society. The Judges, who are visitors, interfere on the principle of exercising an authority over the members of the society, as to their being called to the bar. This is not a case where the Judges could be called upon to interfere to make the benchers submit to government as to one of the members. But here, the Court is called upon to control the society in the admission of their members. Now, as far as the admission of members is concerned, these are voluntary societies, not submitting to any government. They may in their discretion admit or not as they please, and this Court has no power to compel them to admit any individual. The masters and fellows of a college cannot be compelled to admit a particular individual a member. Neither can a corporation be compelled to admit a particular individual a freeman, unless he has acquired an inchoate right to become a freeman. The interference of the Judges in the instance of those members of the societies whom the benchers have refused to call to the bar is perfectly right; because a member who has been suffered to incur expence, with a view to being called to the bar, thereby acquires an inchoate right to be called, and if the benchers refuse to call him they ought to assign a reason for so doing; and if there be no reason, or an insufficient one, then the member who has acquired such inchoate right is entitled to have that right perfected.

Rule refused.

1825.
The King
against
The Benchers
of Lincoln's
Inn.

1825.

HIPPESEY *against* LAYNG.Saturday,
November 26th.

MARRYAT had obtained a rule in *Trinity* term to enter a suggestion to deprive the plaintiff of his costs in this case, on the ground that he ought to have sued in the Court of Requests for the city of *Bath*, established by statute 45 G. 3., which enables persons to sue there for debts not exceeding 10*l.* The cause came on to be tried at the *Bridgwater* Summer assizes 1823, when it was referred, together with another cause, *Layng v. Welsh*, and all matters in difference, to a barrister, and the costs of the causes were to abide the event. The arbitrator afterwards, on the 26th of *February* 1825, made his award, whereby he found that 10*l.* was due to the plaintiff. On the 5th of *May* the defendant's attorney gave a written undertaking, that the costs should be paid as soon as the bill was delivered and the amount settled.

Where a court of request's act enables a defendant to deprive a plaintiff of his costs if he sues in a superior court, the defendant must make his application for that purpose promptly, and where a motion to enter a suggestion to deprive the plaintiff of costs might have been made in *Easter* term, but instead of that, a negotiation respecting the costs was then entered into, and the motion was made in *Trinity* term : Held, that it was too late.

Erskine shewed cause, and contended, that as the action had been referred, it did not come within the statute, and cited *Keene v. Deeble*. (a) [*Bayley* J. It appears to me that the application was not made in time.]

Marryat, contra. The cases of *Watchorn v. Cook* (b), and *Calvert v. Everard* (c), shew that the application is in time if it be made before final judgment.

(a) 3 B. & C. 491.

(b) 2 M. & S. 348.

(c) 5 M. & S. 510.

1825.

—
HIPPLEY
against
LAYNE.

BAYLEY J. I think, that in order to avail the provisions of the statute in question, should have applied promptly to this Court, not have entered into a negotiation respecting The cases of *Watchorn v. Cook*, and *Calver* do not establish that a defendant is always in final judgment, they merely decided that he was too late after judgment. In this case the writ might have been made in *Easter* term, before that a negotiation was entered into, and an order to pay the costs given, and then in *Trin* motion was made. I think that was too late as the defendant had waived the advantage given by the statute.

Rule.

BOND against EVANS.

If bail do not justify in four days after exception, the plaintiff is at liberty to proceed upon the bail-bond, although from the bail having been put in sooner than was necessary, the rule for bringing in the body has not expired, and the sheriff is not liable to an attachment.

CAPIAS returnable on the morrow of which was the 12th of *November*. Bail was taken on the 16th; the plaintiff entered an exception on the 17th; notice of justification was given for the 18th; the bail did not justify on that day. On the 19th the plaintiff took an assignment of the bail bond out writs against the bail. This was a rule for the proceedings for irregularity. After hearing *bell* shew cause, and *Comyn* in support of the rule the Court took time to consider and to enquire into the practice; and now

BAYLEY J. gave judgment. The Master held the practice to be, that the defendant is bound

his bail in four days after exception, although the bail may have been put in sooner than was necessary ; and if he does not, the plaintiff may proceed on the bail-bond immediately, although he cannot attach the sheriff till the rule for bringing in the body has expired.

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BOND
against
EVANS.

Rule discharged.

CHARGE and Others *against* FARHALL.

Monday,
November 28th.

THIS was a rule calling upon the plaintiffs to shew cause why they should not pay to the defendant the costs and expences incurred by the defendant in consequence of the plaintiffs having proceeded in the action in disobedience of a Judge's order. It appeared that the action was upon a promissory note, and the order was for staying the proceedings until the plaintiffs should permit the defendant's agent to inspect and take a copy of the note, the defendant admitting his signature to the note, and undertaking not to make any objection to the stamp. The defendant's agent did not draw up the order on the day on which it was obtained, but took time to consult his client in the country ; and before an answer could be received from his client filed a plea of the general issue, in consequence of a threat from the plaintiffs' attorney that judgment should be signed, unless the order were drawn up forthwith, or a plea filed. Immediately upon receiving the answer of his client the defendant's agent drew up the order, and regularly served it upon the plaintiffs' attorney, who refused to comply with it upon two several applications, and gave notice of trial. The Judges having all left

A Judge's order for a stay of proceedings must be drawn up forthwith. Delay in drawing it up operates as a waiver of it.

1825.

REID and Others *against* HOLLINSHEAD and
Another.

Monday,
November 28th.

TROVER to recover two-thirds of 200 bales of cotton.

Plea, general issue. At the trial before *Abbott C. J.*, at the *London* sittings after *Michaelmas* term 1823, the jury found a verdict for the plaintiffs, subject to the opinion of the Court on the following case.

The plaintiffs were merchants in *London*, and the defendants were brokers in *Liverpool*. In the months of *February* and *April* 1820, Messrs. *T. Davidson* and *J. Milligan* of *Liverpool*, who traded under the firm of *Davidson and Co.*, bought 712 bales of cotton in different parcels. The following correspondence between the plaintiffs and *Davidson and Co.* shews the agreement under which they were so purchased, the account upon which they were bought, and the interest of each party. On the 11th of *February* 1820 the plaintiffs wrote to *Davidson and Co.* a letter, of which the following is an extract: "In consequence of the representations made to us in yours, we hereby authorise you to purchase 1000 bales of bowed cottons of good quality at the lowest price at which you can obtain it against your drafts on us at three months' date, you to be allowed to be one-third interested therein, acting in the business free of commission." To which *Davidson and Co.* returned the following answer on the 14th

A., a merchant in *London*, by letter, directed *B.*, a broker in *Liverpool*, to purchase 1000 bales of cotton, and stated that *B.* was to be allowed to be one-third interested therein, acting in the business free of commission. *B.* agreed to purchase the cotton, and to hold one-third interest therein, charging no commission. *B.* purchased the cotton, and in the subsequent correspondence, which continued for upwards of three months, the transaction was referred to as a joint account, joint concern, joint purchase, joint speculation, joint cotton adventure. *B.* transmitted policies of insurance against loss by fire to *A.*, and stated

that the cotton was deposited in rooms rented by him (*B.*), and that he held the key for their joint security: Held, that *B.* was interested as a partner in the cotton, and consequently that a pledge of the whole by him, without any fraud or collusion on the part of the pawnee, gave a right to the pawnee to hold the goods as against *A.*

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—
 REID
 against
 HOLLINGSHEAD.

February 1820. "We are happy that you ably of an investment in cotton, and make your order of 1000 bales of bowed. V happy to hold one-third interest therein, commission. In expectation that you might us to do something in this way, we picked up on *Saturday* at 12*d.*, which we consider a bargain enter them accordingly to the *joint* account 17th *February* 1820, the plaintiffs wrote to L Co.: "We duly note by your favour of instant, that you take one-third share in the purchase of 1000 bales of cotton, and that you have secured 157 at what appear favorable terms. judge whether our *joint* speculation is still On the 23d *February* 1820, *Davidson and Co* the plaintiffs as follows: "We have this day for the *joint* account, 200 bags bowed cotton. The quality is good, and we trust they will meet your approbation." The 200 bags so were those, two-thirds of which were sought covered in this action. On the 24th of *February* son and Co. wrote again to the plaintiffs: "I have been tempted by the superior quality and cost of a lot of bowed we fell in with to-day, and I to the joint concern 267 bales at 12½*d.*" A 26th *February* they wrote and advised two drafts date for 975*l.* 13*s.* 8*d.* and 861*l.* 6*s.* 5*d.* at which they required the plaintiffs to honor as the debit of cotton on *joint* concern. On 27th *February* the plaintiffs wrote to *Davidson* as follows: "We have received your favours of 24th, and 26th, and make due note of your order of cotton, and your drafts for 975*l.* 13*s.*

861*l.* 6*s.* 5*d.*, in part payment of the *joint* concern."

1825.

On the 4th of *March* 1820, *Davidson* and Co. wrote to the plaintiffs as follows: "We have now to advise our draft of this date for 2793*l.* 12*s.*, which please honor and place to the debit of the joint purchase of cotton." To

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which, on the 6th of *March* 1820, the plaintiffs replied:

"We pay due attention to the contents of your esteemed favor of the 4th instant, and to your draft for 2793*l.* 12*s.* on the joint account." On the 8th of *March* 1820,

Davidson and Co. wrote to the plaintiffs as follows:

"We have to advise our draft of the 6th current for 3820*l.* 5*s.* for the last purchase of cotton on the joint account." On the 10th of *March* the plaintiffs answered

as follows: "We have received your esteemed favor of the 8th instant, and have made due note of your draft for 3820*l.* 5*s.* on the joint account." On the 25th of

March 1820, *Davidson* and Co. wrote to the plaintiffs:

"We now beg to inclose you the policies on the cotton purchased on *joint* account, one of them you will observe includes two lots not belonging to us. These cottons are all, of course, duty paid, and as such, never deposited in any public warehouse. The rooms in which they are stored are rented by us, and we hold the keys for our *joint* security." On the 29th *March* the plaintiffs

acknowledged the receipt of the policies by a letter, in which there was the following passage: "How is your cotton market now generally, and how does it bear with reference to the prices given for this commodity recently on our *joint* account?" On the

4th of *April*, the plaintiffs wrote to *Davidson* and Co.: "As we conceive a sufficient quantity of cotton has been purchased on this *joint* account, under present circumstances we will not make any further

purchases."

account. Part of the above-mentioned quantity of cotton being the 200 bales in question was deposited by *Davidson* and Co. in the warehouse of the defendants, and it was agreed between *Davidson* and Co. and the defendants that the latter were to be employed as brokers to effect sales of this cotton. The defendants were in the habit of making advances from time to time to *Davidson* and Co. In the month of *January* 1821, an advance of 1000*l.*; in the month of *March* 1821, an advance of 1500*l.* was applied for by *Davidson* and Co. from the defendants, who made them by giving their acceptances for those amounts. In consideration of such advances being made, *Davidson* and Co. pledged to the defendants as a security, unknown to the plaintiffs, the 200 bales of cotton in question, which were at those times remaining in the defendants' warehouse. No funds were provided by *Davidson* and Co. to pay the bills, which were paid when due by the defendants. After this pledge of the 200 bales of cotton, and while it remained in the defendants' warehouse, *Davidson* and Co. became bankrupts, being largely indebted to the plaintiffs on account of this particular speculation (which was unsuccessful), as also upon a general account. At the time of the pledge of the cottons, and down to the period of the bankruptcy, the defendants were ignorant that any other persons than *Davidson* and Co. were interested in the said cotton. *Davidson* and Co. at the period of the bankruptcy, were indebted to the defendants in respect of the said advances for which the said pledge was made in more than the value of the said cotton. Before this action was brought the plaintiffs demanded of the defendants the two-thirds of the 200 bales of cotton, and tendered to the defendants the expences

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against
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pences for warehouse-rent and other charge
the defendants on such demand refused to del

The case was argued on a former day in

Kaye for the plaintiff. This is the case and it is a clear principle of law that the better title to the pledge than the pawner has. The first question is, had the pawners, *Davidson*, any interest in the cotton in question, and, secondly, to what extent? Interest they had none, the cotton was the property of the plaintiffs solely. The plaintiffs authorised *Davidson* and Co. to purchase them 1000 bales of cotton, and it was agreed between these parties that the plaintiffs should pay for the cotton, and that *Davidson* and Co. should be entitled to one-third of the profit and loss, acting in "free of commission." The cotton was purchased, but was expected to be and was the property of the plaintiffs, and, therefore, was their property. *Davidson* and Co. were their agents for the effecting the purchases and the sales, but not by their skill and trouble by participating in the speculation, instead of receiving their commission. *Smith v. Watson* (a) is an authority to shew that an agent so paid acquires no property in the goods, as against his principal, though he is a partner, to third parties, and that case must be followed in the present. There the goods were bought in the name of the principal; in this case, in *Davidson* and Co. but an agent buying goods in his own name with the principal's money, does not divest the principal of the property.

(a) 2 B. & C. 401.

legal property in the goods so bought with his money. The same distinction between a partnership in the subject matter, and in the proceeds of an adventure, has been recognized in the cases of *Meyer v. Sharpe* (a), and *Hesketh v. Blanchard* (b). *Davidson* and Co. being interested in the proceeds of the adventure only, could not pledge the cotton itself, and the defendants can derive no title under this tortious pledge. But assuming that *Davidson* and Co. were interested in the cotton, at the utmost, their interest extended only to a third part of it, and according to the doctrine laid down in *Barton v. Williams* (c) they could not pledge the remaining two-thirds belonging to the plaintiffs, and this action is only brought for those two-thirds. In that case *Best J.* says, "A partner in a trading concern generally may dispose of the partnership property, because his authority to do so is implied from the nature of the business; but that by no means extends to a case of a partnership in a particular instance." This was only a single transaction.

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—
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Parke contra. *Davidson* and Co. had a joint interest with the Plaintiffs in the corpus of the goods. They were partners, for the goods were bought upon joint account, to be sold upon joint account, and according to the terms in the letter, the plaintiffs and *Davidson* and Co. were each to be interested therein, viz., in the cotton, in profit and loss. All the terms used in the correspondence, in mercantile phraseology import a partnership, "joint account, share in purchase, joint speculation, joint concern, joint adventure, joint purchase, joint cotton, joint secu-

(a) 5 Taunt. 74.

(b) 4 East, 144.

(c) 5 B. & A. 395.

rity ;"

Bonbonus (a), *Swann v. Steel* (b) are cases where the rule is recognised as applicable to a general partnership. In *Raba v. Ryland and Another* (c), the same rule was applied to a particular partnership; there the plaintiffs had purchased for the joint account of themselves and *Caumont*, in equal thirds, 33 bags of clover seed, shipped to the consignment of *Caumont*, who pledged the same to the defendants for an advance of money; and it was held, that *Caumont* being jointly interested in the seed with the plaintiffs as a partner, he was, in that character, possessed of the entirety. And in *Tupper v. Haythorne* (d) and *Ex parte Gellar in re Hutchinsons* (e) the same rule was applied to a particular partnership. Secondly, one-third at least was pledged, and then this action cannot be maintained. The legal interest in one-third passed, subject to an account, which cannot be taken at law. This is similar to the case of an execution against one of two partners, the sheriff must then take the goods of both, and the other party has no remedy at law, otherwise than by retaking the goods if he can, for the vendee of the sheriff becomes tenant in common with the other co-partner, and the question is, in equity, what the purchaser will be entitled to, *Taylor v. Fields* (f), *Parker v. Pistor*. (g) In *Litt. s. 323*. it is laid down, that if two be possessed of chattels personal in common, by divers titles, as of a horse, an ox, or a cow, &c.; if the one take the whole to himself out of the possession of the other, the other hath no remedy but to take this, from him who hath done to him the

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(a) 8 *Ves. jun.* 540.(b) 7 *East*, 213.(c) *Gow. N. P. C.* 132.(d) *Gow. N. P. C.* 135.(e) 1 *Rose*, 297.(f) 4 *Ves. jun.* 398.(g) 3 *Bos. & Pul.* 289.

partnership in the result of an adventure, without necessarily importing a partnership in the *goods*. The language in the letter to *Davidson* and Co. "we authorize you," and in their reply, "we make due note of your *order*," is such as would pass between principals and agents, and not between partners. The fire policies effected by *Davidson* and Co. in *Liverpool* upon this cotton, were sent to the plaintiffs in *London*, which shews that the parties considered the cotton exclusively the property of the plaintiffs. The passage cited from *Justinian* does not apply. It proceeds upon the assumption of that which is the whole matter in dispute here, "Si duo inter se pacti sint, ut ad unum quidem duæ partes et lucri et damni pertineant, ad alium tertia." The question now is, whether such was the intention of these parties, whether it was so agreed between them. Neither does the reason assigned why such a partnership as that supposed in *Justinian* may well subsist, apply here. "Quia sæpe opera alicujus pro pecunia valet." It is contended that *Davidson* and Co. were to have an actual property in one-third of the corpus of the cotton, as a remuneration for their skill and trouble in selecting, and buying, and selling 1000 bales. The skill and labor of *Davidson* and Co. cannot be said in this case to be equivalent to such a remuneration. *Raba v. Ryland* (a), and *Tupper v. Haythorn* (b), and the case ex parte *Gellar* (c), are all cases where the purchase was joint. Here the plaintiffs paid for the whole. They were not, therefore, partners, nor tenants in common, and *Davidson* and Co. could never have demanded a partition of the cotton. But if they were tenants in common, then the pledge of the whole

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 against
 HOLLINSHED.
(a) *Gow. N. P. C.* 132.(b) *Gow. N. P. C.* 135.(c) 1 *Ross*, 297.

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 Re
 against
 HOLLAND.

subject matter of the tenancy in common, tenant in common, and the subsequent for pledge placed the cotton beyond the control the tenants in common, and was equivalent to tion of it, and, therefore, the action will well

Cn

ABBOTT C. J. This case was argued before the present term. Upon the facts stated, it appears that the goods were purchased by *Davidson* and *Co* in their own names, and remained in their possession and control, and were pledged by them to the defendants, who advanced money upon them without any knowledge of the plaintiffs therein. On the part of the plaintiffs it was shown that *Davidson* and *Co.* had not any interest in the goods as partners or part owners, but only an interest in the profit and loss that might ultimately result out of this speculation; and, secondly, that *Davidson* and *Co.* to have any interest in the goods, they had a property in one-third only, and could not make a valid pledge beyond that extent. It is the opinion that *Davidson* and *Co.* were interested in these goods, and consequently, that the whole made by them without fraud or collusion on the part of the pawnee, gave a right to the defendants to hold the goods as against the plaintiffs. The letters that passed between the plaintiffs and *Davidson* and *Co.* clearly shew that the parties understood a joint concern or partnership in the goods.

Such a partnership may well exist, although the whole price is in the first instance advanced by one party, the other contributing his time and labour, and security, in the selection and purchase of the goods. It is true, that the plaintiffs in their

stipulate that *Davidson* and Co. shall act in the business free of commission, and this circumstance was relied on as making the present case parallel to that of *Smith v. Watson* (a), but the facts of the two cases are very different. In that case it was stated to have been agreed between *Sampson* a merchant and *Gill* a broker, that *Sampson* should buy whalebone through *Gill* as his broker, and that, as a remuneration for his trouble, *Gill* should receive one-fourth of the profits arising from the sale, and bear one-eighth proportion of the losses. Goods were bought under this agreement which produced a profit. After the close of the transactions under it, *Sampson* entered into other speculations and continued to employ *Gill* as a broker, and upon these *Gill* was to receive one-third of the profits, but whether he was to bear any portion of the losses did not appear. All the witnesses stated that *Sampson* employed *Gill* as a broker, and never spoke of him otherwise than as his agent. Upon this state of facts it was held that *Gill* had no interest in the goods, and rightly so, for upon the evidence it plainly appeared that the share of the profits was merely a substitute for the broker's commission, intended probably to stimulate the exertions of *Gill* in buying and selling to the greatest advantage. In the present case *Davidson* and Co. were not brokers; the correspondence is, in our opinion, the language of persons to be jointly interested in the purchase as well as the sale of the goods. *Davidson* and Co., before these transactions, occasionally purchased goods on their own account, though they were general *American* commission merchants, and also transacted business upon com-

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 RWID
 against
 HOLLINGSHEAD.

(a) 2 B. & C. 401.

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against
HOLLINGSHEAD.

mission, and in our opinion the stipulation should act in the business free of commiss denotes that they were to act in it as merchants as agents. Considering the parties therefore in the goods, the cases of *Raba and Anland* (a) and *Tupper v. Heythorn* (b), which on the part of the defendants, are direct au the validity of the pledge in the present cas the plaintiffs. The postea, therefore, must l to the defendants.

Judgment for the

(a) 1 Gow. N. P. C. 132.

(b) 1 Gow. N. P.

Ex parte WILLIAM BIRCH, in the M
LIDSTER, a Bankrupt.

On the 4th of June the plaintiff, in an action of assumpsit, obtained a verdict against the defendant, and on the 18th of June judgment was signed as of Trinity term, which commenced on the 7th of that month. On the 15th of June a commission of bankruptcy issued against the defendant, on an act of bankruptcy committed on the 17th of May preceding: Held, that at the date and suing forth of the commission, the plaintiff had a debt proveable

THE following case was directed by his l Vice-Chancellor for the opinion of this (Hilary term 1822, *William Birch of Stockpo* county of *Chester*, sheriffs' officer, commenced in the Court of King's Bench an action of assumpsit against *John Lidster* the younger, the above-named defendant. The cause of action was stated in the declaration that, in consideration that the plaintiff, as then one *Edward Clayton*, would make a distress arrears on certain goods, the property of *Booth*, the defendant undertook that he had employed *Clayton* to employ the plaintiff for the purpose of making such distress; that the defendant had no authority, and that in consequence thereof an

trespass *quare clausum fregit*, at the suit of *Booth*, had been brought against the plaintiff and three other persons, and a judgment recovered, and execution issued against the plaintiff and the other persons for 20*l.* damages and 66*l.* costs, under which execution the plaintiff's goods were seized, whereby he was compelled to pay, and did pay the said sums, together with the costs of the execution, and was also put to great expence in defending himself, and suffered great inconvenience from the seizure of his goods. Other counts stated the consideration to be, that the plaintiff would assist the defendant in making a distress, and the promise and damage were stated as before; another was on a promise to indemnify, and there was also a count for money paid. In fact the distress was made by the plaintiff's directions, by his assistants, who were accompanied by the defendant; it was made at the defendant's request on a false statement of his authority, and the plaintiff was compelled to pay, and did pay the damages, costs, and costs of execution to the party distrained upon, amounting to 95*l.*, before the commencement of the action. In this action *William Birch*, on the 4th of *June* 1822, obtained a verdict against *John Lidster* the younger, the above-named bankrupt, damages 130*l.*, which verdict was entered generally, and on the 18th of *June* 1822, final judgment was signed on the above-mentioned verdict for 130*l.* damages and 188*l.* costs. This judgment was signed as of *Trinity* term 1822, which commenced on *June* 7th. On the 15th of *June* 1822 a commission of bankrupt was awarded and issued against the said *John Lidster* the younger, founded on an act of bankruptcy committed by him on the 17th of *May* preceding, being the act of bankruptcy on the pro-

1825.

 Ex parte
Висш.

decided on the 46 G. 3. c. 135. s. 2. The whole sum, recovered by *Birch* was, therefore proveable. But, secondly, the sum recovered in the action brought by *Booth* and paid by *Birch* may be considered as paid at the request of *Lidster*, for it was at his request that *Birch* did the act whereby he was rendered liable to that action; *Merewether v. Nixon* (a), *Brown v. Hodgson* (b), *Esall v. Partridge* (c).

1825.

 Ex parte
 Brown.

Alderson contra. It does not appear that *Lidster* was liable to pay the money recovered against *Birch*, the whole case, therefore, turns on the first point. This is not a debt bonâ fide contracted within the meaning of the 46 G. 3. c. 135. s. 2. In the case of *Robinson v. Vale* this Court certainly held otherwise, but a very material authority, *Blogg v. Phillips* (d), was not brought before the Court. There it appeared that goods of a defendant had been taken in execution after he had committed an act of bankruptcy, but more than two months before a commission issued, and it was contended that the transaction was protected by the 46 G. 3. c. 135. s. 1., as a payment by the bankrupt or a bonâ fide transaction with him. But Lord *Ellenborough* said, there was no pretence for calling it a payment, and that the transactions protected by that clause were evidently transactions between the parties in the ordinary course of business, and not transactions carried on through the medium of legal process. The same construction must be applied to the second section, and then it is manifest that a debt originating in a judgment cannot be called a debt bonâ

(a) 8 T. R. 186.

(b) 4 Taunt. 189.

(c) 8 T. R. 308.

(d) 2 Campb. 129.

for it would not have availed the plaintiff had he tried to prove the debt.]

1825.

Ex parte
BIRCH.

Parke in reply. The question was treated as very clear in *Robinson v. Vale*. The word *contracted* is used in the statute instead of *due*, as being more comprehensive, and the expression *bonâ fide* is introduced to exclude cases of fraud. It therefore covers debts due, whether by contracts, *de facto* or in law; a judgment recovered may be considered as a debt contracted in law.

Cur. adv. vult.

The following certificate was afterwards sent.

This case has been argued before us by counsel; we have considered it, and are of opinion that the said *William Birch* had, at the date and suing forth of the said commission against *John Lidster*, a debt proveable under the same.

C. ABBOTT.

J. BAYLEY.

J. S. HOLROYD.

J. LITTLEDALE.

1825.

Monday,
November 28th.

PICKARDO *against* MACHADO

An affidavit to hold to bail, made before a British consul in a foreign country, stated that the defendant was indebted to the plaintiff in certain number of pounds sterling: Held, by three justices, that the affidavit was insufficient, inasmuch as it did not appear with certainty, whether defendant was indebted in British or in Irish sterling money, *Abbott C. J. dissentiente.*

Quære, If a British consul in a foreign country has authority to administer an oath.

IN this case the defendant had been held to order of the Lord Chief Justice upon an affidavit stating that the defendant was indebted to the plaintiff in the sum of 100,000*l. sterling* for and received. A rule nisi had been obtained to charge the defendant out of custody on full bail upon two grounds: first, that a vice-consul had no authority to administer an oath for the purpose of taking a party to bail in this country; and, secondly, that the affidavit was not sufficiently certain, inasmuch as it stated that the defendant was indebted in pounds sterling, and that word applied to English or Irish money. On a former day in this term Mr. Justice Pollock shewed cause against this rule, and Mr. Comyn supported it. For the former it was contended that a consul or vice-consul had authority to administer an oath, and *Omealy v. Thorlt v. Faber* (b) were cited, and at all events they had that authority under the statute 6 G. 4. That statute recited that it was expedient that a consul appointed by his majesty should in all cases have power of administering an oath; and then provided that every affidavit taken before the consul was to have the same force and effect as if it had been sworn before

(a) 8 East, 364.

(b) 1 Chitt. Rep.

of the peace in *England*, or before any other legal or competent authority of the like nature. This is a case clearly within the object of the act. As to the other point it was said, that the affidavit was sufficiently certain: for the word *sterling* being used in an affidavit sworn before the *British* vice-consul, must be taken to denote *British sterling* money. In *Glossop v. Jacob (a)*, a bill was accepted for the payment of 100*l. sterling*, and the omission of the word *sterling* in the description of the bill in the declaration was held to be immaterial. For the defendant it was contended, that a consul, who was a mere commercial agent, had no authority by virtue of his office to administer an oath for the purpose of holding a defendant to bail in this country; and *Vattel's Law of Nations*, book 2. c. 2. s. 34., and b. 4. s. 75., was cited to shew the general nature of the office of consul; and it was contended, that the statute 6 G. 4. c. 87. s. 20. rendered an affidavit made before a consul valid in those cases only where such affidavit would be valid if sworn in this country before a justice of the peace, or before any other legal or competent authority of the like nature. Now, an affidavit to hold to bail must be sworn before a commissioner of the court and not before a justice of the peace, or an officer of the like nature. Secondly, the affidavit stating that the defendant was indebted to the plaintiff in so many pounds sterling, does not sufficiently designate the amount and nature of the claim, for the word sterling applies both to *English* and *Irish* money, which are of different value.

1825.

 PICKARDO
 against
 MACMADO.

Cur. adv. vult.

(a) 1 Stark. 69.

1825.

PICKARDO
against
MACHADO.

The judgment of the Court was now delivered by ABBOTT C. J., who, after stating the facts proceeded as follows. The first question in whether the Court ought to listen to an affidavit made by a foreigner before a *B.* resident in a foreign country? Upon this the Judges are equally divided in opinion, and, I shall say nothing further upon it. The other is, whether the allegation in the affidavit to the effect that the defendant was indebted in so much sterling, is sufficiently certain? My three Brothers are of opinion, that the word *sterling* is uncertain and equivocal in itself to be made the basis of an order to hold to bail, because in this case it is not absolutely certain that the party may be indebted in so much sterling money of value. I must own, that upon the best consideration I am able to give to the subject, I have the misfortune to disagree with my three learned Brothers on this point. I yield, however, on this occasion, to the opinion of all others, with the utmost deference to their opinion, and I yield to it the more readily on this present occasion, because the question has arisen by order made by myself. The result of the deliberation of the Court is, that the defendant is entitled to bail on the charge.

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1825.

STANILAND *against* LUDLAM.

THIS was an action of replevin. The defendant avowed generally for rent due to him as landlord. The case was tried at the last assizes for *Nottingham*, and a verdict was found for the defendant. The Master had allowed the defendant double costs. In ascertaining the amount of double costs he had first of all estimated the single costs, and included therein the expences of the defendant's witnesses, counsels, fees, and court fees, including the fees to special jurors. These sums amounted to 229*l.*, and the whole single costs amounted to 365*l.* The Master then allowed the defendant an equal half part of that sum, without making any deduction therefrom of the expences of witnesses, counsels' fees, &c. The action was brought by the plaintiff, the devisee, under a will alleged to have been executed by *Joseph Staniland*, in *October 1824*, against the defendant, as devisee under a prior will, alleged to have been executed by *Joseph Staniland* in *August 1823*, which will was set up by the defendant in opposition to the other will, and it was intended to try the merits of the respective wills truly and bona fide in that action. It was not commenced with the object of keeping the landlord out of the payment of any rent which was considered to be due to him; but the plaintiff being in possession of lands part of the testator's estates, the defendant, who was devisee under what he considered to be the true will of *Joseph Staniland*, distrained upon the goods of the plaintiff for half a year's rent for the premises, and the

Where a defendant in replevin avows as landlord for rent in arrear, and obtains a verdict, he is entitled to double costs, although the action be really and bona fide brought to try the title to the land.

The true mode of estimating the amount of double costs is, first, to allow the defendant the single costs, including the expences of witnesses, counsel's fees, &c., and then to allow him one half of the amount of the single costs, without making any deduction on account of counsels or court fees, &c.

1825.
 STANILAND
 against
 LUDLAM.

the plaintiff then had no other means of case in a course of trial than by replevying in this action. These facts now appearing, the plaintiff moved for a rule for the N

Denman now moved for a rule for the N view his taxation, and relied upon the opinion by Lord Chief Justice *Eyre*, in *Leominster pany v. Corwell* (a), "that the distress intended by the 11 G. 2. c. 19. s. 22., was a certain rent, directly reserved by a landlord or demise theretofore made." This case of that description, for the defendant demised the land to the plaintiff, but the brought merely to try the title.

Per Curiam. The enacting words of the 11 G. 2. c. 19. s. 22. are, "that it shall be lawful for the defendants in replevin to avow or make cognizance generally that the plaintiff in replevin, or owner of the land whereon the distress was made, is the same under a grant or demise, at such a time as during the time wherein the rent was distrained for which rent then remained due," and "if the plaintiff shall become nonsuit, or have judgment given him, the defendant in such replevin shall pay double costs of suit." These words are verified. The defendant at the trial must have proved himself to have been the landlord, and, therefore, entitled to the benefit of the statute. The n

(a) 1 Bos. & Pull. 213.

certaining the amount of the costs is that which has always been adopted on the plea side of the court, and we shall not disturb it.

1825.

STANILAND
against
LUDLAM.

Rule refused.

The KING *against* The Justices of LEICESTER.

Monday,
November 28th.

IN a former term the Attorney-General obtained a rule, calling upon the defendants to shew cause why a mandamus should not issue, commanding them and the clerk of the peace for the borough of *Leicester*, "to permit and suffer the parishioners of the parish of *Saint Martin* in the said borough, or any of them, to inspect and take copies of all orders of sessions, rates, and other proceedings of the general quarter sessions of the said borough, relative to rates imposed upon the said parishioners by the justices of the said borough, or to which they are contributory, and all accounts and documents relating thereto." The rule was obtained upon an affidavit made by two rated inhabitants of the above parish, stating in substance that the rates had recently become very burthensome to the inhabitants of the said borough, and that although an abstract of the treasurer's receipts and expenditure had of late years been annually published, yet that such abstract did not afford due information to the contributors to the said rate; that the money levied upon them was expended for such purposes only to which the same was applicable by law; and that upon due investigation they *doubted not, and believed* it would appear, that the said justices had raised greater sums upon the inhabit-

Mandamus granted commanding the justices and clerk of the peace of a borough to permit an individual, on behalf of several persons who contributed to the county rate, to inspect and take copies of the last two rates made by the justices, and all orders made for the expenditure of the same, and the several orders of sessions made thereon, and other proceedings and documents relating thereto.

But before such writ can be obtained, an application for such inspection must be made to the justices assembled at quarter sessions.

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1825.
 ———
 The KING
 against
 The Justices of
 LEICESTER.

ants of the said borough than were necess-
 ranted by law; and that the parishioner
 parish in vestry assembled, being desirous
 better information respecting the purposes
 money raised by such rate was applied, I
 authorized agent, made an application to
 tices and clerk of the peace, similar in
 above rule, which was refused.

Scarlett (with whom were *Tindal* and *Goul*
 cause. No application has been made to
 assembled in quarter sessions, to be permitt
 these rates and orders. These documents
 of the court of quarter sessions, and in t
 the clerk of the peace as the officer of the
 justices individually and out of sessions cou
 authority over them.

The *Attorney-General*, contrà, in support
 The rates and orders of sessions in questio
 documents, open to the inspection of all wh
 to the rates. The clerk of the peace is th
 pository of them, and bound to shew them,
 sonable times, to such persons, without a
 sessions to that effect. But

The *Court* said it was quite clear, that a p
 plication to the quarter sessions was necessa
 charged the rule.

In *Easter* term last, the *Attorney-Gener*
 another rule, in the same terms as the forme

affidavit similar in other respects to that on which his former motion was grounded, but which also stated that an application had been made to the quarter sessions by *Samuel Miles*, the attorney for the inhabitants of the parish, to be permitted to inspect and take copies of all such orders of sessions, rates, and other proceedings, and all accounts and documents relating thereto. The affidavit did not state that any facts or grounds of any kind were laid before the Court of quarter sessions to induce them to grant this application, but on the contrary that *Miles* stated to them at the time, that it was made merely with the view of obtaining a judicial decision on the question as to the right of inspection. In answer to this rule, an affidavit stated that an abstract of the treasurer's accounts of all his receipts and expenditure had been duly published each year in a public newspaper pursuant to the provisions of the statute 55 G. 3. c. 51. s. 18., and the affidavit set forth the abstracts published for the last two years.

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against
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Scarlett, *Tindal*, and *Goulburn* now shewed cause. The court of quarter sessions, to whom the application was made, must have the right to judge and determine whether it should be granted or refused. In the present instance, no grounds whatever were laid before them to induce them to grant the inspection, but it was expressly demanded as a matter of mere right, and to determine an abstract point of law. The affidavit upon which the rule was obtained in this Court, did not allege any particular grievance or instance of misapplication of the funds in question, but merely stated, that the deponents "doubted not," and "believed" that such misapplication would appear to have been

1825.

**The King
against
The Justices of
Leicester.**

made. By the statute 12 G. 2. c. 29., (a) in sessions are empowered to make the rate, and the treasurer is to pay the money to the persons as they direct, and by section 8. of the statute it is enacted, that the accounts of the rate (after being passed) shall be deposited with the peace, to be inspected from time to time by the justices, or any of them. But neither that statute nor any other, gives a right to the contributors or to any other person to inspect such rates. In all cases where the legislature means to give a right, it does so in express terms; as in the statute (s. 14.), which enacts, "that all books for repairing public bridges, and other public books, shall, with all orders relating thereto, be entered in a book, to be kept by the clerk of the peace, and be inspected by the clerk amongst the records, to be inspected by the justices, and by any person employed by any county for the purposes of this act." So also the right of an inhabitant to inspect the poor rate is given by 17 G. 2. c. 3. s. 2. in express terms. In this instance, all the statutes are silent as to any person's right, and it must, therefore, be inferred that none has. The statute 55 G. 3. c. 51. s. 18. points out the persons to which the public are to be made acquainted with the expenditure of the county rate, viz., by directing that in each year an abstract of all the treasurer's receipts and expenditure, signed by the justices who audited the accounts, shall be published in a public local newspaper. This has always been done in this borough. Gi

(a) Stat. 13 G. 2. c. 18. s. 7. enables the justices of the peace to exercise all the powers given by stat. 12 G. 2. c. 29. s. 8. to the justices of counties.

veniences will result from transferring the control over the public expenditure of counties and towns from the hands of the justices to those of all the contributors to the rate, and endless litigation will be the certain consequence. The statute 12 G. 2. c. 29. s. 12. gives an appeal in case of parishes being aggrieved by the rate, but that is given to the churchwardens and overseers only, and not to every rated inhabitant.

1825.

The King
against
The Justices of
Leicester.

The *Attorney-General* contra. The abstracts set forth in the affidavit are not sufficient to give the contributors to the rates the information they require, and every inhabitant rated and paying to the rates has a right to inspect and take copies of them, and all orders for the payment of money out of them. Those orders might, if illegal, be removed into this Court by certiorari; and how can it be ascertained whether they are legal or not, unless those who contribute to the rates are allowed to inspect them? The right of appeal given by the 12 G. 2. c. 29. s. 12. to the churchwardens and overseers, refers only to the rate itself, and to cases in which parishes, &c., consider themselves aggrieved by being over-rated with respect to others, but has no bearing upon the orders of sessions for payments out of the rate. He was then stopped by the Court.

ABBOTT C. J. The present rule is too general, but the Court may mould it so as to meet the justice of the case. Let a mandamus issue to the justices and clerk of the peace to permit *S. Miles*, on behalf of the parishioners, to inspect and take copies of the last two rates or assessments made by the said justices for the said borough, and all orders made for the expenditure

relating to such orders in his possession were the vouchers and accounts of the treasurer and high constable of the borough, which having been passed by the said justices at their quarter sessions, were deposited with him, to be kept amongst the records of the said borough, and to be inspected from time to time by the said justices or any of them, according to the form of the statute, &c. ; and that he had received no order or directions from the court of quarter sessions, or from the said justices or any of them, to permit or suffer *Miles* to inspect and take copies of the said orders, &c.

Upon the motion of *Campbell* in *Hilary* term, the Court quashed this return, and ordered a peremptory mandamus to issue.

Tindal afterwards moved that the return should be set down for argument in the ordinary course, in order that the matter might undergo further consideration, and stated the question to be whether the rated parishioners were entitled as of right to inspect the documents mentioned in the writ.

Per Curiam. We have decided the point on the rule to shew cause. Let a peremptory mandamus go.

1825.

The King
against
The Justices of
Leicester.

DOE Dem. LUCY *against* BENNETT.

Monday,
November 28th.

IN *Trinity* term the defendant obtained leave to defend this ejectment, as landlord, and entered into a consent rule. The conclusion of the rule was in this form. "The plaintiff, nevertheless, is at liberty to sign judgment against the casual ejector, but execution thereon is stayed until this Court shall further order." The cause was tried at the last *Cornwall* assizes, when a verdict was obtained by the plaintiff, whereupon judgment was afterwards duly signed, and a writ of possession issued, without any further order of the Court; and on that ground

Where, in ejectment, a person obtains a rule to defend as landlord, the plaintiff nevertheless may sign judgment against the casual ejector, but may not take out execution without further order: Held, that after verdict and judgment against the landlord, execution may be issued against him without any further order of the Court.

Bale obtained a rule to set aside the writ of possession for irregularity, on the authority of *Doe dem. Roberts and Wife v. Gibbs* (a), and the cases there cited.

(a) 1 *Chit. Rep.* 47.

1825.

DOE dem.
 LUCY
 against
 BENNETT.

Marryat on a former day in this term shewed cause. After trial and verdict for the lessor of the plaintiff there is no occasion to apply to the Court for an order to take out execution. Such an application is only necessary where the landlord does not appear at the trial.

Cur. adv. vult

BAYLEY J. The only purpose for which an order of the Court can be necessary to warrant the issuing of execution, is to avoid collusion between the lessor of the plaintiff and him who comes in as landlord; but here, the cause was tried and a verdict and judgment obtained against the defendant. The lessor of the plaintiff issued his execution against him *and not against* the casual ejector. An order for execution against the latter could not, therefore, be necessary. I have enquired as to the practice of the Court of Common Pleas, and find that in such cases no order of the Court is necessary before the issuing of execution.

Rule discharged.

1825.

The KING *against* CLEAR and Another. (a)

A RULE nisi had been obtained for a mandamus directed to the defendants, churchwardens of the parish of *Billinghurst*, in the county of *Sussex*, commanding them to permit *J. Puttock*, an inhabitant of the parish assessed to the relief of the poor, from time to time, and at all reasonable times, to inspect the accounts of the churchwardens and overseers of the poor of the said parish for the years ending respectively at *Lady-day* 1821, 1822, 1823, and 1824, the said *J. Puttock* paying, &c., as required by the act. The affidavit of *Puttock* stated, that he had frequently applied for leave to inspect the accounts, and had offered to pay for the same, but had been refused: he did not, however, state any reason for which he desired to make the inspection.

Where a party applies for a mandamus to compel churchwardens to allow him to inspect their accounts according to the directions of the 17 G. 2. c. 38. he must state some special reason for which he wishes to see the accounts.

It is no answer to the application, that the statute imposes a penalty upon a churchwarden improperly refusing the inspection.

Brodrick shewed cause, and contended that the applicant was bound to make out in support of his rule, first, that he had a specific legal right; and, secondly, that he had no specific legal remedy. The first point depends on the 17 G. 2. c. 38. s. 1. Now it is to be observed, that no inspection of the accounts for the year ending at *Lady-day* 1825 is demanded, and he has no

(a) Two or more of the Judges of this court sat, as upon former occasions, from *Tuesday* the 29th *November* till *Saturday* the 10th of *December* inclusive, and from *Monday* the 9th of *January* until *Friday* the 20th day of *January* inclusive. This and the following cases were determined between the 29th *November* and 10th of *December*. The cases decided between the 9th and 20th day of *January* will be published in the subsequent volume.

1825.

**The King
against
Clerk.**

right to inspect the accounts of former year only purpose to be answered by the inspection of the party an opportunity of appealing, but time for appealing had elapsed as to all the rates, except the year ending at *Lady-day* 1825. Secondly, a specific legal remedy, if the inspection of the accounts be improperly refused, for by s.14. of the 17th Geo. 2. a penalty is imposed upon any churchwarden or overseer who neglects or refuses to obey and perform the order or direction of the act. But if the Court have jurisdiction in this case, as may be contended on the authority of *Rex v. Clapham* (a), and *Rex v. B. & C.* they will not interfere when the object of the writ is not stated.

Long contra. It appears by the preamble of the 17 G. 2. c. 38., that the legislature had then intended that the money raised for the relief of the poor should not be misapplied; and in order to remedy this defect was enacted, that churchwardens and overseers performing their office should hand over to their successors their books of accounts, and that every person assessed and liable to be assessed should have liberty to inspect the same at all reasonable times. There is no limit to the right of inspection to the books of the preceding year, nor is it said that the inspection is only had for the purposes of appeal only. In *Rex v. Clapham*, a mandamus was granted to oblige the churchwardens of the poor to deliver over the books of the poor to the new overseer, and it was said by the Court "They are public books, and ought to be

(a) 1 Wils. 305.

(b) 1 Bolt. 3.

over by one overseer to another, that all the parishioners may have access to them, and the overseer and churchwarden for the time being ought to have the custody thereof;" and a writ was granted on similar grounds in *Rex v. Bletshow*. The penalty given by s. 14. is no answer to the application, for it is not given to the party grieved, but to the churchwardens and overseers for the use of the poor.

1825.

The KING
against
CLEAR.

BAYLEY J. The right of inspection given by the 17 G. 2. c. 38. is not general, but for the remedy of the evils contemplated by the statute. The applicant should, therefore, have shewn some ground for desiring to inspect the books, and for want of such statement, I think that this rule must be discharged. It is no answer to the application, that in a subsequent clause a penalty is imposed; that is not given by way of compensation to the party grieved, but it is imposed for the relief of the poor, and to punish the offender.

HOLROYD J. In *Com. Dig., Mandamus (A)*, it is stated that the writ of mandamus is granted to prevent failure of justice, and for the execution of the common law, or of a statute, or of the king's charter; but not as a private remedy to the party. The applicant not having stated the grounds upon which he desires to inspect the books, has not brought himself within that rule for granting a mandamus. His right as a parishioner is a mere private right, for which the Court will not grant it. The penalty, indeed, is not such a specific legal remedy as would prevent our interference, but inasmuch as I think the party should have pointed out some public ground

first, that the indictment contained no averment that *Cecil* was in execution of his office at the time of the interruption; secondly, that the particular threats and menaces used by the defendant ought to have been set out.

1825.

The King
against
Cecil.

. *F. Pollock, Robinson, and Dover* shewed cause. The objections to this indictment are founded upon a misconception of the nature of the offence charged. Where obstruction in the execution of an office is the gist of the offence, a precise allegation that the party was at the time acting in the execution of his office is necessary; but here, that is merely collateral, and if *Cecil* was not in the execution of his office, the other averments in the indictment cannot be true. [*Bayley J.* All that is intendment only, and an indictment cannot be made good by intendment.] It is a necessary intendment, for if *Cecil* was not a clerk in holy orders, and acting as such, the corpse could not have been buried according to the rites and ceremonies of the church of *England*. It must, therefore, be taken that he was so. At all events, it amounts to an allegation that the defendant, by threats and menaces, prevented the burial of the dead. Now that is an unlawful act, as appears from *Jones v. Ashburnham* (a), where Lord *Ellenborough*, speaking of arresting a dead body, says, that such an act is revolting to humanity, and illegal; and in *Rex v. Lynn* (b), a case is referred to in which parties were indicted for a conspiracy to prevent the burial of a dead body. So also the case of *Andrews v. Cawthorne* (c), shews that it is the duty of every parochial minister to bury the dead, and

(a) 4 *East*, 465.(b) 2 *T. R.* 738.(c) *Willet*, 536.

that

Storks contra. There are three decisive objections to this indictment: first, it does not appear that *Cecil* was a clerk at the time of the alleged offence; secondly, it is not stated that he was in the discharge of his duty; thirdly, the nature of the obstruction, and the alleged threats and menaces, should have been specified in the indictment. As to the first, the word *clerk* is equivocal, and it is merely introduced as the addition of *Cecil* at the time of the indictment; there should have been a distinct averment that at the time of the supposed offence he was a clerk in holy orders. In an indictment of one for not taking the office of constable, the manner of his election must be shewn; and according to *Hawk. P. C. b. 2. c. 25. s. 60. (a)* no intendment can be made in support of an indictment. Secondly, a clergyman has no general right to bury in any parish with which he is unconnected; it should, therefore, have been stated that *Cecil* was lawfully engaged in burying the corpse. Thirdly, the nature of the obstruction and of the threats and menaces should have been specified, *Rex v. How. (b)*

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The King
against
Cecilia

BAYLEY J. It is clearly laid down in the passage which has been referred to in *Hawk. P. C.* that nothing material in an indictment can be taken by way of intendment or implication. Now it appears to me, that the unlawful act attributed to the defendant is not sufficiently stated, and that there is not on this record that degree of certainty which every indictment ought to contain. It first charges that the defendant did unlawfully interrupt, hinder, and obstruct *W. Cecil*, clerk, in

(a) 7th edition.

(b) 2 Str. 699.

reading

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—
The King
against
CAREW.

reading the order for the burial of the dead ring the corpse of *J. Dawes*. Now every int not an indictable offence; nor does this alleg sarily import that the service was altogether to. The indictment should have shewn h fendant interrupted *Cecil*. We should see the record for what we are to punish, and th should see plainly what he is to answer. ment proceeds: "And the defendant did the unlawfully by threats and menaces prevent the burial of the said corpse;" but we ar what those threats and menaces were. I already suggested of a stranger coming to bu and being threatened with a prosecution in siastical court, the burial would be prevented and menaces, but that would not be an offence. Then it is said that the allegation fendant *unlawfully* prevented the burial, is but the indictment should shew how his ac lawful. The case of *Rex v. How* is a strong to shew the necessity of setting out the natu obstruction, and the means by which it wa That was an indictment against the defendan he "quendam *N. Carew* being a justice of pe execution of his office, per diversa scandalosa : contemptuosa verba abusus fuit et ipsum in officii sui prædicti vi et armis illicite retardavit." for the prosecution admitted that the indictme as to the words, for not setting them out, but that it was good as to the obstruction; but it bad in toto, because *retardavit* would hardl calling it an obstruction, and if it would, some have been set out. That case is exactly like tl

that there it was alleged that the party retarded was acting in the execution of his office. Here there is no such allegation, nor is it averred that *Cecil* was at that time a clerk, nor that he was lawfully burying the corpse, nor that it had been lawfully brought for sepulture in that place. It is said that those facts must have been so, for that otherwise *Cecil* could not have been performing the service "according to the rites of the Church of *England*." Admitting that, which however by no means follows, it would be making an indictment good by intendment, which would be contrary to the principles of criminal pleading. For these reasons I am of opinion that the judgment must be arrested.

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The King
against
CHEER.

HOLROYD J. The facts alleged in the second count of this indictment, assuming them to have been proved, may or may not have amounted to an indictable offence; and if so, they do not shew a charge sufficient to render the defendant liable to punishment. The allegation that the act was done unlawfully does not suffice, unless the facts stated shew an offence. *Rex v. How* is decisive upon that point, and if we were to hold otherwise the law resulting from the facts would be left as a question for the decision of the jury. It is not alleged that the person obstructed was a clergyman, he is described as "the said *W. Cecil*;" and in the first count he is called *W. Cecil*, clerk; but the description in the second count only goes to the identity of the person, and by no means shews that he had a right to perform the burial service. It has been argued that unless he were duly qualified, he could not have been performing the service according to the rites and ceremonies of the Church of *England*. If the validity of the argument were admitted, it would only

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The KING
against
CHERRY.

only make the indictment good by inferring truth the expression has no such effect; it is construed as meaning that *Cecil* assumed corpse according to that ritual, and not the right to do so. It is consistent with all the that *Cecil* was proceeding without lawful authority that the defendant was justified in the intention therefore concur in thinking that the judgment arrested.

Rule 1

(a) *Littledale J.* was absent on the Winter Circuit.

STYLES *against* WARDLE.

Where a deed has no date, or an impossible date, as the 30th February, and in the deed reference is made to the date, that word must be construed *delivery*, but if it has a sensible date, the word *date* occurring in other parts of the deed, means the day of the date and not of the delivery; and therefore in covenant on an indenture dated

the 24th December 1822, whereby plaintiff, in consideration of 944*l.* leased house and premises for ninety-seven years, subject to an agreement for an under-lease to one *R. B.* for twenty-one years; and the defendant covenanted that he would, within one calendar month then next after the date of the indenture, procure *A.* to accept the premises for the term of twenty-one years from Christmas day 1821; and *A.* would not accept the lease, that he, defendant, would, within one calendar month after the expiration of the said twenty-four calendar months, pay to the plaintiff the sum of money: it was held, that the deed took effect from the day of the *A.*, not having accepted the lease, defendant was liable to pay the stipulated sum at the expiration of twenty-five calendar months from the date of the deed.

COVENANT upon an indenture dated the 24th December 1822, made between plaintiff and defendant, whereby, in consideration of 944*l.*, and covenants on the part of plaintiff to be performed, defendant leased to him a certain house and premises for ninety-seven years, subject to an agreement for an under-lease to one *R. B.* for twenty-one years; and the defendant covenanted with plaintiff that he, defendant, should and would within the space of twenty-four calendar months then next after the date of the indenture, procure the said *R. B.*, at the sum of 1*l.* pence, to accept and take a lease of the said

for the term of twenty-one years from *Christmas Day* 1821, determinable, &c., at the net yearly rent of, &c.,* and to execute and deliver a counterpart thereof. And further, that in case the said *R. B.*, would not accept and take the said lease upon the terms aforesaid, that then the said Defendant should and would, within one calendar month next after the end and expiration of the said twenty-four calendar months, repay to plaintiff for his absolute use 72*l.* 16*s.* 4*d.* Breach, that the defendant did not within the space of twenty-four calendar months after the date of the said indenture (and which said twenty-four calendar months had long since elapsed,) cause or procure the said *R. B.* to accept and take, nor did, nor would the said *R. B.* accept or take a lease of the said premises for the term of twenty-one years from, &c., at the yearly rent, &c.; nor did nor would the said defendant cause or procure *R. B.* to execute and deliver a counterpart thereof. And although by means of the said several premises, and according to the indenture defendant became liable to repay to plaintiff, within one calendar month next after the expiration of the said twenty-four calendar months, the said sum of 72*l.* 16*s.* 4*d.*, yet defendant did not repay it, (although one calendar month from, &c., had long since expired.) Plea, that the said indenture was, in fact, executed and delivered long after the time on which it bears date, to wit, on the 8th of *April* 1823, and that at the time of exhibiting the bill of the plaintiff against the defendant, twenty-five calendar months had not elapsed from the execution of the indenture. Demurrer and joinder.

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STYLES
against
WARDLE.

Chitty in support of the demurrer was stopped by the Court.

after the date, it could not have been contended that the defendant was immediately on the execution of it liable to an action for a breach of covenant, yet that would be the case if the computation were made from the date.

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STYLES
against
WARDLE

BAYLEY J. The question in this case is simply as to the construction to be put upon the words of this deed. A deed has no operation until delivery, and there may be cases in which, *ut res valeat*, it is necessary to construe date, delivery. When there is no date, or an impossible date, that word must mean delivery. But where there is a sensible date, that word in other parts of the deed means the day of the date, and not of the delivery. This distinction is noticed in *Co. Litt.* 46 *b.*, where it is said, "If a lease be made by indenture, bearing date 26th *May*, to hold, &c., for twenty-one years from the date, or from the day of the date, it shall begin on the 27th day of *May*. If the lease bears date the 26th of *May* to have, &c., *from the making hereof, or from henceforth*, it shall begin on the day on which it is delivered, &c." And afterwards it is said, "if an indenture of lease bear date which is void, or impossible, as the 30th of *February*, &c., if in this case the term be limited to begin from the date, it shall begin from the delivery, as if there had been no date at all." In *Arnitt v. Bream*(*a*), it is said, "If the award had no date, it must be computed from the delivery, and that is one sense of *datus*." The question here is, what in this covenant is the meaning of *datus*? I consider that a party executing a deed agrees that the day therein-mentioned shall be the date for purposes of computation. It would be very dangerous to allow a dif-

(a) 2 *Ld. Raym.* 1082.

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 STYLES
 against
 WARDLE.

ferent construction of the word *date*, for then executed on the 30th *March* to hold from being the 25th, and the tenant were to e as if from that day, yet, after the expiration he might defeat an ejectment on the gr lease was executed on a day subsequent to *March*, and that he did not hold from th the authorities give a definite meaning to t in general, but shew that it *may* have a diffe when that is necessary ut res valet. It l that the computation could not have beer be made from the date if the twenty-four elapsed before the execution of the deed. true, for then the intention of the parties, t putation should not be made from the *date*, been apparent. Here the meaning of the de and according to that a breach of covenai mitted before the commencement of the a plea is therefore bad.

HOLROYD J. concurred.

Judgment for the

(a) *Littledale J.* was absent on the winter circ

1825.

The KING *against* The Justices of SOMERSET.

IN obedience to a writ of mandamus issued by this Court (a), the justices at the *Epiphany* sessions for the county of *Somerset* heard the appeal of *James Tucker* against an order of the justices at petty sessions, dismissing his application for relief under the 3 G. 4. c. 33. s. 2., and the Court then found that the appellant had suffered damage to the extent of 30*l.* by means of two mows of corn, the property of the appellant, having, on the night of the 3d day of *November* 1823, been wilfully, unlawfully, and maliciously set on fire by some person or persons unknown, at the parish of *Yatton*, within the hundred of *Winterstoke*, in the county of *Somerset*; and that court did, therefore, order and adjudge the said sum of 30*l.*, together with the sum of 4*l.* 13*s.* 4*d.*, the costs and charges incurred in that behalf to be paid by the inhabitants of the said hundred of *Winterstoke* to the said appellant, subject to the following case for the opinion of this Court. Two ricks of barley belonging to the appellant, *James Tucker*, on the night of the 3d of *November* 1823, at *Yatton* in the hundred of *Winterstoke*, were maliciously set fire to. The appellant duly made complaint according to the provisions of the 3 G. 4. c. 33. before the magistrates assembled in a petty sessions, duly held within the said hundred, to recover damages; and his complaint was there dismissed, upon the ground that no riot or tumult was proved to have

Where the damages sustained by means of the unlawfully and maliciously setting fire to any house, barn, outhouse, mow or stack of corn, &c. is less than 30*l.*, the remedy by action given by the 9 G. 1. c. 22. s. 7. to the party grieved is taken away, and a summary remedy substituted for it by the 3 G. 4. c. 33., although the injury has not been done by a riotous and tumultuous assembly.

(a) See *Rex v. Tucker*, 3 B. & C. 544.

extensive with the old one. Then with respect to the evidence, the respondents cannot complain of the examination of the party, for that was rendered unavoidable by the objection which they took to the admission of his examination at the petty sessions. Besides, the facts to which he deposed were amply proved by other witnesses. (He was then stopped by the Court.)

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The King
against
The Justices of
Somerset.

Bernard and Earl contra. The stat. 9 G. 1. c. 22., commonly called the Black Act, was made at a time when depredations were committed by great numbers of persons who, in *Blac. Com. (a)*, are compared to the followers of *Robin-hood*, and it is probable that, although riotous assemblies are not expressly mentioned in the act, yet it was passed with a view to prevent injuries committed by numbers of persons acting in concert. If that were so, then there is a good reason why the legislature should limit the remedy given by the 3 G. 4. c. 33. to cases of injuries done by riotous and tumultuous assemblies. It is difficult in any other way to account for the introduction of the words "riotous and tumultuous assembly of persons" at the end of the first section. Why should the legislature limit the remedy for the loss of a thrashing machine, to cases where it has been so destroyed, and give a more comprehensive remedy where a barn or out-house has been burnt down. But whatever doubts may exist as to the intention of the legislature, it is manifest that no remedy is given in this case. The power given to the justices at petty sessions is summary, and therefore to be construed strictly. Now, sect. 2. requires the party grieved to give notice "of such riotous and tumultuous

(a) 4 *Black. Com.* 246.

parliament, six of them relating to acts done by riotous and tumultuous assemblies; and the 9 G. 1. c. 22. s. 7., relating to the offence in question, and speaking of that, the expression as to riotous assemblies, is omitted. It then proceeds: "And whereas great expences are incurred in recovering a compensation for small damages by proceeding under actions at law, in compliance with the directions of the said recited acts, the costs greatly exceeding in many instances the amount of the damages: and whereas, for the relief of the inhabitants of several cities, &c., in which such mischief may be done by riotous and disorderly persons, or may be done *unlawfully and maliciously*, it will be attended with great public benefit, that the damages not exceeding a certain amount shall be recovered by a shorter and more summary process than as directed by the said recited acts; be it therefore enacted, &c." The words *unlawfully and maliciously* are not unimportant, being applicable to the 9 G. 1. c. 22., and not to the other statutes recited. It is manifest, therefore, from the preamble, that the new statute was intended to apply to cases within the 9 G. 1. c. 22. s. 7., in the same manner as to those within the other recited acts. It then enacts, that where the damage shall not exceed 30*l.* no action shall be maintained for or on account of the loss sustained by the demolishing, &c. wholly or in part of any church, chapel, &c. or any dwelling-house, barn, &c., by any persons riotously and tumultuously assembled; and so it goes through the several recited acts, beginning the enactment as to each with "for or on account of," and repeating the expression as to riotous and tumultuous assemblies, until it comes to the 9 G. 1. c. 22., as to which it says, "or for or on account of the loss, injury, or damage sustained by the *unlawfully*

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or

such riotous assembly having taken place;" and it has been well argued, that, accurately speaking, that can only apply to cases where there has been such an assembly. The consequence, however, of that construction would be, to leave one species of injury without any redress, although the legislature plainly intended to provide for it. I therefore think that we must not construe the statute literally, but that the notice of the riotous assembly must be taken to have been inserted as an instance only, and that the statute must be read as if notice of the *offence* had been required, so as to make the remedy co-extensive with all the cases before mentioned. If that be the right construction as to the notice, the same must be applicable to the fourth section, which gives power to the justices at sessions to hear and examine the party grieved and his witnesses "touching such riotous assembly." That section mentions the party grieved generally, not the party grieved by the acts of a riotous assembly; it must, therefore, be considered as extending to the party grieved by any of the offences before specified in the act. For these reasons I am of opinion, that although there has manifestly been some mistake in penning the statute, yet the proper construction of it is to make the second and fourth sections co-extensive with the cases to which the recited acts were applicable. Upon the other point I have no doubt that the sessions on the appeal might hear the same evidence which the statute makes admissible at the petty sessions.

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HOLROYD J. concurred.

Rule discharged. (a)

(a) *Littledale J.* was absent on the circuit.

Secondly, the present declaration contains a count upon a promise to the plaintiffs, it is clear that the bankrupt could not sue upon that in the former action, and evidence of any transactions between the defendant and *Collier* before his bankruptcy would not support that count.

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Brace
against
Cox.

Hutchinson contra. The substantial question is, whether the same evidence would or would not support the two actions, otherwise a judgment in trover could not be a bar to an action for money had and received, but that it may be so was decided in *Kitchen v. Campbell*. (a) [Bayley J. Can you contend that if the declaration in the present action had contained no count but that upon the account stated with the plaintiffs, they could have recovered without giving evidence of something that passed after the bankruptcy?] The same account may have been stated with *Collier* before, and the plaintiffs after the bankruptcy, and the suits being substantially the same, the pendency of the one may be pleaded in abatement of the other, *Boyce v. Douglas* (b).

BAYLEY J. It is clear that this plea is bad with reference to the count, upon the account stated, which is not founded upon one of the promises in the former action, and being bad as to that it is bad in toto. Again, *Kinnear v. Tarrant* is a decisive answer on the merits. It does not appear how far the action commenced by *Collier* has proceeded, but for any thing that appears, the defendant may now plead the bankruptcy of the plaintiff in bar of it. The judgment of the Court in *Kinnear v. Tarrant* corrected the former

(a) 5 Wils. 304.

(b) 1 Campb. 60.

and out-house was part and parcel, to hold the same to the plaintiff from *the 26th March inclusive then next, for one year then next ensuing, and fully to be complete and ended, and so from year to year for so long time as the defendant and the plaintiff should respectively please*, at the rent or sum of 52*l.* 10*s.* payable half-yearly, on the 29th *September* and 25th *March* in every year. By virtue of which demise the plaintiff on the 24th *March* 1821, entered into and upon the said demised tenements and premises, and was possessed thereof. And being so possessed, before the 25th of *March* 1824, to wit, on the 19th *December* 1823, at, &c. gave the defendant, *H.*, notice that he, plaintiff, would quit and deliver up possession of the demised tenements so by him holden as aforesaid, on the said 25th day of *March* 1824, and the defendants in fact say, that the plaintiff did not, nor would on the day and year last aforesaid, quit or deliver up possession of the said demised tenements and premises pursuant to the notice, but refused so to do, and held over and continued in possession of the demised tenements and premises from the day and year last aforesaid, until the said time when, &c., whereby the plaintiff became liable to pay to the defendant *H.*, during the time he so continued in possession after the 25th *March* 1824 as aforesaid, the yearly rent or sum of 105*l.*, being at the rate of double the rent or sum which the plaintiff would otherwise have paid in case the said notice had not been so given. And because the sum of 52*l.* 10*s.* of the said rent or sum of 105*l.* for one half year next before and ending on the 29th of *September* 1824, and from thence, until, and at the said time when, &c., was due, &c., in arrear from the plaintiff to the defendant, *H.*, he in his own right, well avowed,
and

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JOHNSTONE
against
HUDLESSON.

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tenancy from year to year, but it will be argued that the assent of the landlord to the notice to quit made it operate as a present surrender of the tenant's interest. At the time when that notice was given, the tenant had a subsisting term in the premises, and then by the statute of frauds that term could not be surrendered, except by note in writing, or by act and operation of law. *Mollet v. Brayne*. (a) The notice to quit, unless it were binding on the tenant at the time when it was given, was no more than a proposal on the part of the tenant to quit at a given period, which the landlord might or might not agree to. If the landlord did assent to it immediately, it would then operate as an agreement between the landlord and tenant that the latter should yield up his interest at a given period, but a surrender is an actual yielding up of an estate for life or year to him that hath an immediate estate and reversion. It would be directly contrary to the intention of the parties to construe the agreement in this case as a surrender at the time when the notice to quit was given; and when it expired the tenant refused to yield up his interest. But assuming that such an agreement might operate as a surrender, either at the time when the notice to quit was given, or when it expired, it would so operate, not by act and operation of law, but by reason of the agreement of the parties; and the statute of frauds then requires that such a surrender should be in writing. This is distinguishable from *Thomas v. Cook* (b), because, in that case, there was an actual change of possession. Besides, the Court of Exchequer have decided upon this very notice in *Doe demise of Hudleston v. Johnstone* (c), that although

(a) 2 Campb. 104. (b) 2 B. & A. 119. (c) 1 McClelland v. Young, 141.

has agreed with another tenant. The statute, therefore, contemplates a case where a landlord is put to inconvenience in consequence of the tenant's giving a notice to quit, by which the tenant had power to determine his lease. Now the tenant in this case had no power to determine his tenancy by the notice which he gave, and that must have been known to the landlord, and, therefore, he could not sustain the inconvenience contemplated by the statute. This, therefore, was not a case within the mischiefs intended to be remedied. It is true that the enacting words of the section are larger and sufficient to comprehend the present case, but they must be construed together with the words of the recital, and effect must be given to all the words of the section: The enacting words are "that in case the tenant give notice of his intention to quit at a time mentioned in the notice, and does not deliver up possession, then he shall pay double rent." Now construing these words with reference to the mischief to be remedied, viz., the inconvenience resulting to landlords in consequence of tenants who have power to determine their leases by giving notice to quit, refusing to deliver up possession when the landlord has agreed with another tenant; the notice of the intention to quit, mentioned in the enacting part, must be a notice by the giving of which the tenant has power to determine his tenancy.

There is no authority to shew that a tenant is liable to double rent where his tenancy has not been duly determined by a valid notice to quit. In *Timmins v. Rowlinson* (a) it was decided, that a lease by parol was a

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(a) 3 Burr. 1603.

and if so, there might be more than half a year's notice; and *Doe v. Green* (a) is an authority to shew that a notice for less than six calendar months is sufficient. But, assuming that it does sufficiently appear that less than half a year's notice was given, still that notice having been accepted and assented to by the landlord, was sufficient to determine the tenancy on two grounds; first, because the parties agreed to consider it a reasonable notice to quit; secondly, because it operated as a surrender by operation of law. But assuming that the tenancy was not determined, still the tenant having held over after having given a notice to quit, the landlord was entitled to distrain for double rent. At all events he is entitled to recover the single rent. As to the first point, the parol notice to quit in less than half a year having been accepted and assented to by the landlord, is sufficient not to destroy the tenant's then subsisting term for the current year, but to prevent the commencement of a new term, which otherwise would commence at the beginning of the following year. The interest of the tenant in the premises for the *current* year could only be determined by a surrender in writing, but it does not therefore follow that a new interest for a second year may not be prevented from commencing, by a notice which both parties have agreed to consider reasonable. The nature of a tenancy from year to year is thus explained by Lord *Mansfield*, in *Right v. Darby*. (b) "If there be a lease for a year, and by consent of both parties the tenant continue in possession afterwards, the law implies a tacit renovation of the contract. They are supposed to have renewed the old agreement, which was to hold for a year. But

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(a) 4 *Esp. N. P. C.* 196.(b) 1 *T. R.* 159.

circumstances should arise. Suppose that the landlord and tenant had agreed at *Christmas* that the landlord should demise to the tenant for a quarter of a year, and that the tenant had accepted that demise, that would have operated as a surrender of the former term. Now here the notice given by the tenant, and accepted by the landlord, in point of legal effect, operated as a new demise from the landlord to the tenant for a quarter of a year from *Christmas* to *Lady-day*, and, consequently, as a surrender of the former term. *Thomas v. Cook* is expressly in point.

But assuming that the tenancy was not determined, still the tenant having given the landlord a notice to quit, and not having quitted in pursuance of it, was liable under the stat. 11 G. 2. c. 19. s. 18. to pay double rent; for here the tenant had the power to determine the tenancy, he gave the notice, and refused to deliver up the possession. It is a case, therefore, within the very words of the enacting part of the section, and this statute must be construed by itself, and not with reference to the enactments in the statute 4 G. 2. c. 28. There is a material distinction between the two statutes. The statute 4 G. 2. c. 28. requires that there should be a demand of possession, and a notice in writing by the landlord. The statute 11 G. 2. c. 19. s. 18. requires no such thing; and it recognizes the party by the name of tenant, which the first statute does not. The latter statute also gives the landlord a right to *distrain* for double rent, which is a remedy applicable only to the relation of landlord and tenant. It therefore contemplates a continuance of the tenancy after the time when the notice to quit has expired. At all events, the defendant is entitled to the single rent; for it appears that the plaintiff continued

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land ; and that could not be put an end to by a parol notice to quit at the expiration of three months. The statute of frauds, 29 Car. 2. c. 3. s. 3., says, “ that no leases or estates, or interests either of freehold or terms of years, or any uncertain interest in any lands, tenements, or hereditaments shall be surrendered, unless it be by deed or note in writing, or by act and operation of law.” It is said that although a parol notice to quit at the end of three months may not of itself be sufficient to determine a tenancy from year to year, yet that such notice having been given by the tenant, and accepted by the landlord, may operate as a surrender of the residue of the term by operation of law. And *Thomas v. Cook* (a) has been relied upon as an authority in point. There *Thomas* had let a house to *Cook* as tenant from year to year ; *Cook* underlet to one *Perks*, an under-tenant, commencing at *Christmas* 1816, and at *Lady-day* 1817, distrained upon the under-tenant for rent. Rent then being due from *Cook* to *Thomas*, he gave notice to the under-tenant not to pay the rent to *Cook* ; and upon the latter’s refusing to take the under-tenant’s bill for the amount due, *Thomas* agreed to take it himself in payment of the rent due from *Cook* to him, saying that he would not have any thing further to do with *Cook* ; and afterwards, in *October* 1817, *Thomas* himself distrained the goods of *Perks* for rent in arrear. Now in that case there was not only a declaration by the original landlord that he would no longer consider *Cook* as his tenant, but there was an acceptance by him of another person as his tenant, and that acceptance was assented to by *Cook*. The original tenant was not only willing to yield up his interest in the premises, but

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(a) 2 B. & A. 119.

notice to quit, it would not have been such an acceptance of that notice to quit by the landlord as would have operated as a surrender of the tenant's interest. The notice given by the tenant being one which the landlord might treat as a nullity, it would continue inoperative until the landlord assented to it. When that assent was given, the effect of it would be to make the notice to quit operate as an agreement between the parties that the tenant should yield up his interest at the time mentioned in the notice. Assuming that the assent by the landlord to such a notice may make it operate as a surrender of the tenant's interest, (upon which I give no opinion,) it must operate as an actual surrender, by reason of the agreement of the parties, and not as a surrender by operation of law. But the statute of frauds requires that such a surrender should be by note in writing. I think, therefore, that if the landlord was willing, and intended to accept this notice to quit, he ought, in order to have made it binding on himself and on the tenant, to have expressed that assent in writing. Not having bound himself by an assent in writing to treat it as such, I think the tenant was not bound to quit at the time specified in this notice, so as to entitle the landlord to maintain an ejectment.

Then the question is, whether, although the notice be not binding so as to entitle the landlord to bring ejectment, it is so far binding on the tenant as to make him liable to pay the double rent under the statute 11 G. 2. c. 19. s. 18. I am of opinion that that statute was intended to give the landlord a remedy for double rent in those cases only where the tenant has given a notice binding upon him to quit at the expiration of the time specified in the notice, and upon which the landlord might

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the tenant shall give the notice contemplated in the preamble, viz., such a notice as the tenant has power to give in order to determine the tenancy, and so as to make it binding on the landlord to accept possession of the premises. If that were not so, the consequence would be, that if a tenant having twenty-one years by lease, gave notice that he would quit at the end of the first year of the term, he would be liable to pay double rent from that period, although the landlord could not, in contemplation of law, be injured by receiving a notice which he was not bound to act upon. It is supposed that the case of *Timmins v. Rawlinson* (a), has established that a notice to quit, given less than half a year before the expiration of the time mentioned in such notice, is sufficient to entitle a landlord to maintain an action for double rent, but such a conclusion is not fairly to be deduced from that case. There the lease was not alleged to be from year to year, but for one year only, and if that be so, then the tenant was bound to quit at the end of that year, without any notice whatever. The only case which raises any degree of doubt upon the question is that of *Shirley v. Newman*. (b) In that case Lord *Kenyon* seems to have thought that an agreement by the landlord to accept less than half a year's notice was sufficient to put an end to the tenancy; but the question upon the statute of frauds was not presented to his attention. There is also this essential difference between that case and this, that there the tenant had actually quitted possession of the premises. Upon the whole, therefore, I am of opinion that the interest of the tenant not having been

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(a) 3 Burr. 1603.

(b) 1 Esp. 266.

the expiration of the time mentioned in the notice to quit. I think he may, under the avowry, recover any part of the double rent which is due to him under the statute, but that he cannot recover any part of the single rent which is due to him under a contract. I think also that the notice to quit mentioned in the pleadings must be taken to be a notice for less than half a year, and that it was not, therefore, sufficient to determine a tenancy from year to year. The notice not having been given so much as half a year before the expiration of the current year, at the time when it was given another interest had vested in the tenant to continue for the remainder of that and the whole of the following year. This notice was not binding, therefore, on the landlord or tenant, so as to enable the former to maintain ejectment. If an *actual* surrender of the tenant's interest were necessary in order to determine the tenancy, it is perfectly clear that such a surrender must be in writing. I am of opinion that there was not in this case any surrender by operation of law, because the tenant never yielded up the possession of the premises to the landlord, or to any person on his behalf. If, besides an agreement between the landlord and tenant, that the interest of the latter should be yielded up to the former at a particular period, there had also been an actual yielding up of the possession to another person, the law in that case might have worked a surrender. But then it would work such a surrender, not by reason of the agreement of the parties alone, but by reason of that agreement coupled with the change of possession. In *Thomas v. Cook* (a) the tenant had yielded up possession

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(a) 2 B. & A. 119.

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**BLOXAM and WARRINGTON, Assignees of SAXBY,
a Bankrupt, against SANDERS and Others.**

TROVER to recover the value of a quantity of hops from the defendants. At the trial before *Abbott C.J.* at the *London* sittings, after last *Trinity* term, the jury found a verdict for the plaintiffs, damages 3000*l.*, subject to the opinion of this Court upon the following case:

The plaintiffs were assignees of *J. R. Saxby*, a bankrupt under a commission of bankrupt duly issued against him on the 5th *January*, 1824. The act of bankruptcy was committed on the 1st *November* 1823, the bankrupt having on that day surrendered himself to prison, where he lay more than two months. The defendants were hop factors and merchants in the borough of *Southwark*. Previous to his bankruptcy the bankrupt had been a dealer in hops, and on the 7th, 16th, and 23d *August* purchased from the defendants the hops (among others) for which this action was brought. Bought notes were delivered in the following form: "Mr. *John Robert Saxby*, of *Sanders, Parkes*, and *Co.* " *T. M. Simmons*, eight pockets at 155*s.* 8th *August* 1823." Part of the hops were weighed, and an account of the weights was delivered to *Saxby* by the defendants. The samples were given to the bankrupt, and bills of parcels were also delivered to him in which he was

A., a hop-merchant, on several days in *August*, sold to *B.*, by contract, various parcels of hops. Part of them were weighed and an account of the weights, together with samples, delivered to the vendee. The usual time of payment in the trade was the second *Saturday* subsequent to the purchase. *B.* did not pay for the hops at the usual time, whereupon *A.* gave notice that unless they were paid for by a certain day they would be re-sold. The hops were not paid for, and *A.* re-sold a part, with the consent of *B.*, who afterwards became bankrupt, and then *A.* sold the residue of the hops without the assent of *B.* or his assignees.

Account sales of the hops so sold were delivered to *B.*, in which he was charged warehouse rent from the 30th of *August*. The assignees of *B.* demanded the hops of *A.* and tendered the warehouse rent charges, &c.; and *A.* having refused to deliver them, brought trover. The jury found that defendant had not rescinded the contract of sale: Held, that the assignees were not entitled to maintain trover to recover the value of the hops, inasmuch as in order to maintain that action, the party must have not only a right of property but a right of possession, and that although a vendee of goods acquires a right of property by the contract of sale, yet he does not acquire a right of possession to the goods until he pays or tenders the price.

stated to be sold for *Saxby*, and he was charged warehouse rent from the 30th of *August*, and also commission on the sales. Besides the hops purchased from the defendants, the bankrupt placed in their warehouse nineteen pockets of hops for sale by them (as factors), of which fifteen pockets were sold on and after the 13th of *January* 1824 of the value of 77*l.* 19*s.* 5*d.*, and of which four remained in their warehouse at the time of the trial, which four were of the value of 14*l.*, and there were also unsold of the hops purchased from defendants seven bags, fifty-six pockets, of the value of 251*l.* 13*s.* 6*d.* There was a demand by plaintiffs of these hops, and a tender of warehouse rent and charges, and a refusal on the part of the defendants to deliver them, before action brought. The jury found that the defendants did not rescind the sales made by them to the bankrupt. This case was argued at the sittings before last term, by

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BLOKAM
against
SANDERS.

Evans for the plaintiffs. The assignees are entitled to recover the full value of all the hops. As to the nineteen pockets which were the property of the bankrupt, and which the defendants held as factors, there is no pretence for saying that the assignees are not entitled to recover the full value of them. As to the remainder, they were sold by the defendants to the bankrupt upon credit, to be paid for according to the usage of the trade, on the second *Saturday* after the sale. The property in the goods vested by the sale immediately in the bankrupt. In *Comyn's Digest*, tit. *Agreement*, B. 3., it is laid down, "If a man agree for goods at such a price, the bargain shall be void if the money be not paid immediately. For in every bargain

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payment

[*Bayley J.* If parol evidence of the usage was admissible, why were not the declarations of the bankrupt admissible to shew that the hops were not to be taken away until paid for?] The rule as to giving parol evidence of the usage of trade does not apply to that, but assuming that the defendant once had a lien, it arose by special agreement, and was destroyed by the sale; he is therefore liable to account to the assignees, *Parry v. Dawson (a)*, *Sweet v. Pym (b)*. [*Littledale J.* In *Langfort v. Tiler (c)* *Holt C. J.* says, "that after earnest given the vendor cannot sell the goods to another without a default in the vendee; and therefore if the vendee does not come and pay and take the goods, the vendor ought to go and request him; and then if he does not come and pay and take away the goods in convenient time, the agreement is dissolved, and he is at liberty to sell them to any other person."] Here the jury have found that the contract was not rescinded, the defendants therefore had at most but a strict lien; and having wrongfully sold the goods, they are liable to pay the full value in this action, and must treat the price as a debt due from the bankrupt. [This point was elaborately argued, but the Court pronounced no opinion upon it. *M'Combie v. Davies (d)*, *Solly v. Rathbone (e)*, and *Graham v. Dyster (f)* were cited.]

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Abraham contra. It must be admitted that the plaintiffs are entitled to recover the value of the nineteen pockets of hops which the defendants had in their pos-

(a) 3 *Anstr.* 710.(c) 1 *Salk.* 113.(e) 2 *M. & S.* 298.(b) 1 *East*, 4.(d) 7 *East*, 7.(f) 6 *M. & S.* 1.

didly admitted upon the argument, and was clear beyond all doubt, that the defendants were not warranted in applying the proceeds of the fifteen pockets to the purpose to which they attempted to apply them, and that they had no legal ground for withholding the four pockets; and, therefore, to the extent of these nineteen pockets, the value of which is 91*l.* 19*s.* 5*d.*, we think it clear that the plaintiffs are entitled to recover. The other quantities were hops *Saxby* had bargained to buy of the defendants on different days in *August* 1823, and for which defendants had delivered bought notes to *Saxby*. The bought notes were in this form: "Mr. *J. R. Saxby*, of *Sanders, Parkes, and Co.*, *T. M. Simmonds*, eight pockets at 155*s.*, 8th *August* 1823." Part of the hops were weighed, and an account delivered to *Saxby* of the weights, and samples were given to *Saxby*, and invoices delivered. The bought notes were silent as to the time for delivering the hops, and also as to the time for paying for them, but the usual time for paying for hops was proved to be the second *Saturday* after the purchase. It was also proved that *Saxby* had said that the hops were to remain with the defendants till they were paid for; but as the admissibility of such evidence was questioned, and in our view of the case it is unnecessary to decide that point, I only mention it to dismiss it. (The learned Judge then stated the other facts set out in the special case, and then proceeded as follows.) Under these circumstances the question is, whether in respect of these hops the plaintiffs are entitled to recover. It was urged, on the part of the plaintiffs, that the sale of these hops vested the property in them in *Saxby*; that the hops were to be considered as sold

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the credit expires will destroy his right of possession, if he has not before that time obtained actual possession, and put him in the same situation as if there had been no bargain for credit, it is not now necessary to enquire, because this is a case of insolvency, and in case of insolvency the point seems to be perfectly clear, *Hanson v. Meyer* (a). If the seller has dispatched the goods to the buyer, and insolvency occurs, he has a right in virtue of his original ownership to stop them in transitu, *Mason v. Lickbarrow* (b), *Ellis v. Hunt* (c), *Hodgson v. Loy* (d), *Inglis and others v. Usherwood* (e), *Bohtlingk v. Inglis* (f). Why? Because the property is vested in the buyer, so as to subject him to the risk of any accident; but he has not an indefeasible right to the possession, and his insolvency, without payment of the price, defeats that right. And if this be the case after he has dispatched the goods, and whilst they are in transitu, à fortiori, is it when he has never parted with the goods, and when no transitus has begun. The buyer, or those who stand in his place, may still obtain the right of possession if they will pay or tender the price, or they may still act upon their right of property if any thing unwarrantable is done to that right. If, for instance, the original vendor sell when he ought not, they may bring a special action against him for the injury they sustain by such wrongful sale, and recover damages to the extent of that injury; but they can maintain no action in which right of property and right of possession are both requisite, unless they have both those rights, *Gordon v.*

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 BLOXAM
against
SANDERS.

(a) 6 East, 614.

(c) 3 T. R. 464.

(e) 1 East, 515.

(b) 1 H. Bl. 357.

(d) 7 T. R. 440.

(f) 3 East, 381.

Harper.

BLOXAM and Another, Assignees of SAXBY,
against MORLEY.

THIS was also an action of trover brought by the same plaintiffs to recover the value of other hops sold by the defendants to the plaintiffs under circumstances nearly similar to those in the last case, which it is unnecessary to set out, as they are sufficiently stated by the learned Judge who delivered the opinion of the Court. The case was argued by *Evans* for the plaintiffs, and *Abraham* for the defendant, and the arguments urged were substantially the same as in the last case.

Cur. adv. vult.

BAYLEY J. now delivered the judgment of the Court. This was also an action of trover for hops, which were the subject of sale from the defendant to *Saxby*, and the only distinctions between this case, and that of *Bloxam v. Saunders* are these, that the bought notes here imported that the hops were sold at certain credits (*a*), that the defendant received 700*l.* in part payment of the price, that some of the hops were in the defendant's possession, and some in the warehouses of other persons, in the defendant's name, and that the defendant sold them, some on the day the act of bankruptcy was

(*a*) The first contract was made on the 19th *August*, and the hops were to be paid, one half by cash on the 30th *August*, and the other half on the 6th *September*.

committed,

sons, they stand substantially upon the same footing. We are, therefore, of opinion that in this case the defendant is entitled to the postea.

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BLOXAM
against
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Judgment for the defendant.

The KING *against* The Inhabitants of NORTH
CURRY.

UPON an appeal by *V. Stuckey, R. Bagshot, and T. W. Bagshot* against a rate made for the relief of the poor of the parish of *North Curry* in the county of *Somerset*, the sessions amended the rate by striking out the sum of 16*l.* 13*s.* 4*d.* assessed on the appellants in respect of their stock in trade in the said parish, subject to the opinion of this Court on the following case:

The appellants were partners in trade, all residing in the parish of *Langport*, and carried on a considerable branch of their business in coals, culm, deals, and salt in *North Curry*, by means of a foreman and other servants. The foreman and his family resided there in a house on part of the premises on which the trade was carried on, belonging to the appellants, for which they were assessed as proprietors and occupiers in the rate appealed against at 1*l.* 2*s.*, and they were also assessed for stock in trade 16*l.* 13*s.* 4*d.* Neither of the appellants ever slept in the parish of *North Curry*, but they came there for the purpose of inspecting the foreman's accounts, and to see how the business was going on. On such occasions the acting partner used a small parlour in the foreman's house as a counting room, which the foreman in the absence of the appellants used when

Several partners of a firm carried on a branch of their business in the parish of *A.* by means of a foreman and other servants who resided in the parish, in a house part of the premises where the business was carried on, but no one of the partners resided in that parish: Held, that they were not rateable to the relief of the poor in that parish in respect of their stock in trade there.

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looking to the language of the act per se, the appellants come within the definition of inhabitants given by Lord Coke, 2 *Inst.* 702., “*Habitatio dicitur ab habendo, quia qui propriis manibus et sumptibus possidet et habet ibi habitare dicitur;*” and he says, that inhabitants is the largest word of the kind. And in the *Attorney-General v. Parker* (a), Lord Hardwicke says, that it includes housekeepers, though not rated to the poor, and also persons who are not housekeepers, as, for instance, such who have gained a settlement, and by that means become inhabitants. But, thirdly, construing this word by analogy to the construction put upon it in other cases where the law has imposed a burden upon inhabitants eo nomine, it must be taken to include the present appellants. (They then referred to the statute of bridges, 2 *Inst.* 702., *Jeffrey’s case* (b), and *Mayor of Colchester v. Goodwin* (c).) In *Rex v. Poynder* (d) it was held that the partners of a firm who had a dwelling house in a particular parish, in which none of them resided, were householders within the 43 *Eliz. c. 2.*, and liable to serve the office of overseer. So persons under similar circumstances are liable to take a parish apprentice, although the statute of *Eliz.* enacts, that no person shall be bound to receive a parish apprentice, unless he be an *inhabitant* and occupier in the parish where such child lives, *Rex v. Clapp* (e), *Rex v. Barwick* (f). In *Rex v. Tunstead* (g), Lord Kenyon considered the word *inhabitant*, as used in that statute, to be synonymous with occupier, and not to be confined to residents. This statute is to be construed in the same mode as other legislative enactments made in pari ma-

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against
The Inhabit-
ants of
Newn Court.

(a) 3 *Atk.* 577.(c) 1 *Carter*, 119.(e) 3 *T. R.* 107.(g) 3 *T. R.* 523.(b) 5 *Co.* 66.(d) 1 *B. & C.* 178.(f) 7 *T. R.* 35.

of profit was an incorporeal hereditament, viz., tolls. *Rex v. Adlard* does not apply, because there the question was, whether the defendant was liable to serve the office of constable, which is a personal, and not a pecuniary service. But assuming that the word *inhabitants* in this statute means residents only, the statute imposes the tax upon inhabitants, parsons, vicars, and *others*. Some effect must be given to the latter word: and giving it a reasonable effect, it may be construed to mean another person, not residing, but having ability within the parish, and if so, then the appellants in the court below were properly rated.

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against
The Inhabit-
ants of
NORTH CUREY.

BAYLEY J. If the question raised in this case were *res integra*, the argument addressed to us would deserve great consideration. But there have been cases in which it has been held that a party (not being a parson or vicar) to be rateable to the relief of the poor must either be an inhabitant or occupier of lands within the parish; and I need hardly observe, that in this branch of the law certainty is very desirable. If the appellants in this case were liable to be rated, it must be because they come within the description of the persons upon whom the liability is imposed by the statute 43 *Eliz. c. 2*. That statute enacts that competent sums shall be raised by taxation of "every inhabitant, parson, vicar, and *other*, and of every occupier of lands, &c. in the said parish, to be gathered out of the same parish, according to the ability of the same parish." It has been insisted in this case that *Stuckey* and his partners are persons liable to be rated either as inhabitants or as persons coming within the meaning of the words "and *other*." In the numerous cases, however, which have

used as descriptive of the persons to be taxed, viz. "every inhabitant, parson, vicar, and other, and every occupier of lands." In *Rex v. Nicholson* (a) the Court were of opinion that the word *inhabitant* was not to be taken in the extensive sense which had been applied to it in the construction of the statute of bridges, but in a confined sense, as descriptive only of a resident within the parish. *Le Blanc J.* said that the word *inhabitant* was used as well as *occupiers*, and that he considered that by the former was meant a person who was resident in the place, for one might *occupy* without being resident, and the statute meant to include both. It is also stated in *Nolan's Poor Laws*, 3d edit. p. 72., that personal property cannot be rated unless the proprietor reside in the parish. Then the question is, what is the meaning of the word "*resides*." I take it that that word, where there is nothing to shew that it is used in a more extensive sense, denotes the place where an individual eats, drinks, and sleeps, or where his family or his servants eat, drink, and sleep; and if that be so, there is no ground for saying that *Stuckey* or his partners had a residence in the place in question. I think that, according to the former decisions, the word *inhabitants* in the 48 *Eliz. c. 2.* must be confined to residents; and, therefore, inasmuch as the appellants were not residents within the parish, they were not liable to be rated in respect of their personal property.

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ants of
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HOLROYD J. It seems to me that, consistently with the construction put upon the words of the statute of

(a) 12 *East*, 542.

occupier of real property in order to make him rateable; and *Bayley J.* says: "In a statute which mentions *inhabitant* as well as *occupier*, inhabitant must mean *resident*, otherwise it would mean the same as *occupier*."

In *Williams v. Jones (a)*, it was held, on the same grounds, that a non-resident proprietor was not rateable for tolls of a ferry. The construction which it is contended ought to be put upon the words "and other," would have applied to those cases as well as to this; and if that be the right construction those cases have been improperly decided. I think that according to the construction already put upon this statute, the words "and other" in this clause of the statute must mean "and other inhabitants;" and that being so, then, for the reasons already given, *Stuckey* and his partners were not rateable.

Order of sessions confirmed. (b)

(a) 12 East, 546.

(b) *The King v. Fryer and Others*. — Upon an appeal by *William Fryer, J. Gosse*, and *Robert Pack*, against a rate made on the 8th of May 1824, for the relief of the poor of the parish of *St. James*, in the town and county of *Poole*, whereby they were assessed for certain ships mentioned in the rate for exports and imports (yearly value 3500*l.*) 10*l.* 10*s.*; copper stock (yearly average 50*l.*) 3*s.*, the sessions for the town and county of *Poole* confirmed the rate, subject to the opinion of this Court, on a case which stated that *Fryer, Gosse*, and *Pack* were in partnership together as merchants, and were interested in equal thirds in the partnership stock and effects, and the vessels belonging thereto. The partnership business was carried on at *Poole* and at *Newfoundland*. At *Poole* they had a countinghouse and storehouses, and a clerk used the countinghouse and kept the key, but did not sleep there. Mr. *Fryer* also carried on the business of a banker with third persons in the parish of *Wimborne Minster*, six miles from *Poole*, and his dwelling-house was at *Wimborne*. The banking partnership had also a countinghouse and some other rooms, and a stable in *Poole*, and a clerk of the banking partnership lived on those premises. The furniture in the rooms belonged to him, but the furniture in the countinghouse belonged to the banking firm. None of the partners in the banking firm resided in *Poole*. *Pack*, one of the partners in

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the said company had due notice. And that in and by the said act it was enacted, that all the costs, charges, and expences attending the applying for, obtaining, and passing that act, should be paid and discharged out of the monies to be subscribed by virtue of that act, in preference to all other payments whatsoever. Averment, that divers large sums of money, amounting, in the whole, to 10,000*l.*, became and were subscribed by virtue of the act, and came into the hands of the said company, and thereupon it became the duty of the company to pay, and they became liable to pay, and ought to have paid to the plaintiffs the said costs, charges, and expences of the plaintiffs attending the applying for, obtaining, and passing of the act, from and out of the money so subscribed by virtue of the act, in preference to all other payments whatsoever, and being so liable, the said company then and there agreed to pay the same to the plaintiffs, when they, the company, should be thereunto afterwards requested, whereby and by reason of the premises, and by virtue of the said act, and of the said sum of 600*l.* being and remaining wholly unpaid and unsatisfied, an action accrued to the plaintiffs to demand and have of and from the said company the said sum of 600*l.*, parcel of the said sum above demanded. Other counts stated that the company were indebted to the plaintiffs for work and labour in soliciting, procuring, and obtaining the act; for money paid, laid out, and expended; and upon an account stated. General demurrer and joinder.

Russell in support of the demurrer. All the counts, except the first, are founded upon simple contract. Now it is a general proposition that a corporation can do no

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in debt generally for the carriage of goods, and the use and hire of ships, and give the deed in evidence to ascertain the amount, but must declare upon the deed. Secondly, as to the special count a contract is there stated, and the count is founded upon that contract, and, therefore, the contract cannot be rejected as surplusage. In an action founded upon a tort, it is sufficient if part only of the allegation is proved; provided what is proved affords a ground for maintaining the action, *Ricketts v. Salwey* (a); but it is otherwise as to actions founded upon contract. But assuming that the allegation that the defendants contracted could be rejected, and that the action might be taken to be founded upon a statutory duty, then the form of the action should have been case, and not debt. For the cause of action is that the defendants have neglected to comply with the provisions of the statute to the prejudice of the plaintiffs. It is true that where a penal statute does not prescribe any form of recovery for the party grieved, debt may be maintained, but that is where the statute prohibits the doing of an act under a *certain* penalty in numero to be paid to the party grieved. Thus under the stat. 2 & 3 Ed. 6. c. 13. debt may be maintained for the value of the tithes not duly set forth, but that statute enacts "that no person shall take or carry away the tithes therein mentioned before he hath set forth the tithe or agreed for the same, under the pain or forfeiture of treble the value of the tithes so carried away." There are other cases in which the statute expressly gives an action of debt, as the statute 1 Ric. 2. c. 12. for an escape out of execution, or the statute 4 G. 2. c. 28. s. 1. against a tenant for double value for not quit-

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(a) 2 B. & A. 360.

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must be presumed upon general demurrer that the contract was by deed.

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BAYLEY J. It is not necessary to decide in this case whether a corporation may or may not be liable on a simple contract. That question is not raised by this demurrer as far as it applies to the first count of the declaration. That count states that the plaintiffs were employed to obtain the act of parliament; that they did obtain it; that their costs amounted to a certain sum, of which the defendants had notice; and that by the act it was enacted that the costs attending the obtaining the act should be paid out of the first money subscribed by virtue of the act, in preference to all other payments whatsoever. It then states that money was subscribed by virtue of the act; that it came into the hands of the company, and that it became their duty to pay the costs to the plaintiffs, and that they did not pay. Now where an act of parliament casts upon a party an obligation to pay a specific sum of money to particular persons, the law then enables those persons to maintain an action of debt. It is said that the action should have been case, and not debt; and that on the 8 *Anne*, c. 14. case is the proper form of action against the sheriff for removing goods without levying a year's rent. That statute directs that the party at whose suit the execution is sued out shall, before the removal of the goods from the premises, pay the rent to the landlord; and the sheriff is empowered to levy and pay to the plaintiff the money so due for the rent, as well as the execution money. The object of the enactment was that no goods should be removed off the premises until the rent was secured to the landlord. The duty cast upon the sheriff by that act of parlia-

upon general demurrer that there was such a deed. The consequence is, that there must be judgment for the plaintiffs.

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The WARWICK
Gas Light Co.

HOLROYD J. I think that all the counts may be supported. The first count states all the facts necessary to constitute a debt. It does indeed contain an allegation that the defendants agreed to pay the money, but, independently of that allegation, the other facts stated in that count are sufficient to shew that the defendants were under a legal obligation to pay the money to the plaintiffs. That allegation, therefore, may be rejected as surplusage. In actions against the sheriff under the stat. 8 *Anne*, c. 14. for removing goods without levying a year's rent, the sheriff after notice from the landlord that a year's rent is due, becomes a tort feasor by removing the goods, and liable in damages to the landlord for the consequence of that wrongful act. But here the act of parliament directed that the costs of obtaining the bill should be paid out of the first monies subscribed under the act. When the money so subscribed came to the possession of the company, they became by law liable to pay those costs; and the amount of them was money which the defendants owed to, and unjustly detained from the plaintiffs. So under the stat. 28 *Eliz.* c. 4. which says that the sheriff shall take for his fees no more than 12 pence for every 20*l.* under 100*l.*, and 6*d.* for every 20*l.* above 100*l.*, the sheriff may maintain debt for his fees, *Com. Dig., Debt*, (A 1.). As to the common counts I am also of opinion that if a corporation cannot contract but by deed, we may upon general demurrer infer that there was a deed.

Judgment for the plaintiff.

why it is granted, shews it to be necessary that the defendant after he receives it should have some time allowed him to plead. But in this case the Court having discharged the rule with costs, it is clear that the motion should never have been made, and the defendant ought not to be allowed to profit by his own wrong. The rule nisi which stayed the proceedings, meant only to stay the adverse proceedings of the plaintiff, and not to dispense with the defendant's own proceeding to put in bail so as to secure himself. At all events the defendant should have put in his bail immediately upon the rule being discharged, whereas the rule was discharged on the 21st, and the assignment of the bail bond was taken on the 22d, on the evening of which day notice of bail was given.

1825,

ST. HANNAH
against
BAYN.

Comyn in support of the rule. The rule nisi stayed proceedings until that rule was disposed of, and it is the invariable rule that a party staying proceedings has as much time after the rule is discharged, as he had when it was obtained. If the rule nisi was improperly obtained, the defendant was sufficiently punished by its being discharged with costs. The defendant could not tell until the rule was discharged, whether he was bound to put in bail or not. It was only reasonable that he should have until the 22d to put in his bail. The bill of particulars is an instance which proves the general rule that the party ought to have the same time after as before.

BAYLEY J. It seems to me that the defendant, whose rule nisi was discharged with costs, ought not to be, with respect to time, in a better condition by reason of his

1925.

St. HANLAIR
against
BYAM.

his own rule, improperly obtained. In the payment of the costs of the rule made sufficient compensation to the plaintiff for time. The staying of proceedings applies adverse proceedings of the plaintiff, and no proceedings of the defendant for his own security that the defendant, if he did not put in bail rule, ought at all events to have put it in immediately the rule being discharged. But as there is of a real defence upon the merits, it seems that the proceedings upon the assignment bond should be stayed upon payment of all those proceedings and of the motion.

HOLROYD J. concurred.

Rule absolute on the

END OF MICHAELMAS TERM.

AN
INDEX
TO THE
PRINCIPAL MATTERS.

ACTION ON THE CASE.

1. A plaintiff is bound to accept from a defendant in custody under a ca. sa. the debt and costs when tendered in satisfaction of his debt, and to sign an authority to the sheriff to discharge the defendant out of custody. And an action on the case will lie against a plaintiff for having maliciously refused so to do; and the refusal to sign the discharge is sufficient *prima facie* evidence of malice in the absence of circumstances to rebut the presumption. *Crozer v. Pilling and Moore*, E. 6 G. 4. 26
2. Case against three defendants, proprietors of a stage-coach. The declaration stated that the defendants so carelessly managed their coach and horses, that the coach ran against the plaintiff and broke his leg. It appeared in evidence that one of the defendants was driving at the time when the accident happened, and the jury found that it happened through his *negligent* driving: Held, that the plaintiff might maintain *case* against all the proprietors, although he might perhaps have been entitled to bring trespass against the one that drove the coach. *Moreton v. Hardern and two others*, E. 6 G. 4. Page 223

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3. Case for an injury done to plaintiff's reversionary interest in land, by cutting and carrying away branches of trees growing there. Second count in trover for the wood carried away. It appeared in evidence that the land was let by the plaintiff to the occupier under a written agreement: Held, that in order to support the first count the plaintiff was bound to produce it.

The plaintiff proved that the defendant carried away some branches of the trees, but gave no evidence of the value: Held, that he was entitled to nominal damages on the count in trover. *Cotterill v. Hobby*, T. 6 G. 4.

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AGREEMENT.

See COVENANT, 3.

An attorney, town clerk, and clerk of the peace for the borough of L. in the county of L., upon the dissolution of a partnership which had existed between him and two other persons, entered into an agreement to pay to one of them (C. D.) a certain sum of money, and to use his endeavours to procure for him one-fourth of the prosecutions arising in the town clerk's office. In an action by C. D. on this agreement, it appeared

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having decided the case, this court refused a mandamus.

Quære, if the sessions ought to have adjourned instead of quashing the order. *The King v. The Justices of Monmouthshire*, M. 6 G. 4. Page 846

ARBITRAMENT.

Where two parties entered into an agreement (not under seal,) to refer a dispute to the arbitration of C. S., and bound themselves mutually in a penalty "for the true and faithful observance and performance" of the award to be made by C. S.: Held, that the penalty was incurred by a revocation of the submission. *Warburton v. Storr*, E. 6 G. 4. 103

ARREST.

A. arrested *B.* on an affidavit of debt for money paid to his use, but did not declare until ruled to do so, and soon afterwards discontinued the action, and paid the costs: Held, that this was sufficient *prima facie* evidence of malice, and the absence of probable cause to support an action for a malicious arrest. *Nicholson v. Coghill*, E. 6 G. 4. 21

ASSAULT AND BATTERY.

See TRESPASS.

ASSUMPSIT.

1. *A.* being seised of an ancient mill, together with a stream of water, diverted out of a river, and flowing from thence unto her mill, and *B.* being possessed of other mills, together with a stream of water diverted out of the same river, above the stream of *A.*, by means of a head wear, and flowing from thence through the lands of *A.* down to *B.*'s mills, as appurtenant to the same: *B.* erected upon other lands, below the lands of *A.*, and near the said watercourse, two other mills, whereby it becoming necessary for him

(*B.*) to have a larger supply of water, he widened and deepened his watercourse in the soil of *A.*, and raised and heightened the head wear, and thereby diverted the greatest part of the water into the watercourse for the use of his mills, so that the water was prevented from flowing down to the mill of *A.* so copiously as it had formerly done, and thereby *A.*'s mill became of no use. *A.* having recovered damages in one action against *B.* on this account, and having afterwards brought a second action for subsequent damages, in order to prevent all further disputes *B.* agreed to take a grant from *A.* of the use and benefit of the watercourse so widened and deepened, and of the liberty of diverting the water out of the river. By lease reciting these facts *A.*, in consideration of 1500*l.* paid by *B.*, demised to *B.* the use of the watercourse so widened and deepened as aforesaid, and the free liberty of diverting so much of the water of the river into and along the watercourse as should be necessary for the use of *B.*'s mills, habendum for the use of ninety-nine years, if three persons therein named should so long live, at an annual rent. Soon after the execution of this deed, *A.*'s mill was destroyed. *B.*, or those claiming under him, continued to enjoy the watercourse and the use of the water during the term, and paid the rent. The lease having determined by the death of the last surviving cestui qui vie, the person claiming under the grantee continued to enjoy the watercourse in the manner described in the grant, and paid rent for it. The reversion in the lands, upon which *A.*'s mill formerly stood, having vested in *C.*, it was held that the latter might maintain *indebitatus assumpsit* for the use and occupation of the watercourse

1814, and payable to her testator, and for money had, &c. The defendant on being applied to for payment of interest, stated that he would bring her some on the following *Sunday*: Held, that although this was an admission that something was due, still, as it did not appear what the nature of the debt was, or that it was due to the plaintiff as executrix, or in her own right, or that it was one for which assumpsit would lie, the plaintiff was not entitled to recover even nominal damages, and a nonsuit was entered. *Green, Executrix of D. Boaz v. Davies*, E. 6 G. 4. Page 235

7. Where a declaration in assumpsit alleged, that in consideration that plaintiff would retain and employ defendants to lay out a sum of money in the purchase of an annuity, they undertook to do their duty in the premises; that plaintiff did retain and employ them, but defendants did not do their duty, but on the contrary took an insufficient security for the payment of the annuity, whereby plaintiff lost the money: Held, on motion in arrest of judgment, that the count was bad, inasmuch as it did not state that any reward was to be paid to the defendants, or that they were employed in any particular character, so as to make them responsible for taking a bad security, although not guilty of negligence or dishonesty.

Other counts alleged that the defendants at the time when they lent the money, knew that the security was insufficient, but did not allege that the plaintiff had sustained any damage.

Semble, that on that ground those counts were also bad. *Dartnall v. Howard and Another*, T. 6 G. 4. 345

8. A judgment obtained in one of the superior courts in *Ireland*, since the union, is not a record in

England, and assumpsit is maintainable upon such a judgment. *Harris v. Saunders*, T. 6 G. 4.

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9. Where in assumpsit plaintiff declared, that he had bargained and agreed with one *J. E.* for the purchase of certain freehold houses at a certain price, and defendant, in consideration that plaintiff would sell and give up to him (defendant) the said bargain, and suffer him to become the purchaser of the houses, defendant promised to pay 40*l.*, and averred that plaintiff did give up the bargain to defendant, and suffered him to become the purchaser, and that defendant did accordingly become the purchaser, and take the said bargain, and obtain a conveyance from *J. E.* on the terms aforesaid, but that defendant had not paid the 40*l.*: Held, after verdict for the plaintiff, that it must then be presumed that the bargain between plaintiff and *J. E.* was in writing; and that the giving up of that contract to defendant was a sufficient consideration for his promise. *Price v. Seaman*, (in error) T. 6 G. 4. 525

10. Assumpsit for goods sold and delivered. Plea, that the goods sold and delivered to defendant by *A.*, the factor and agent of plaintiff, with the privity of plaintiff, at and for the goods of *A.*, and that the defendant did not know that the goods were not the property of *A.*; that at the time of the sale and delivery, *A.* was, and still is indebted to defendant in more than the value of the goods, and that defendant is ready and willing to set off and allow to plaintiff the value of the goods, out of the monies so due and owing from *A.*: Held on special demurrer that the plea was good. *Carr v. Hincliffe*, T. 6 G. 4. 547

then proceeded to *Calcutta*, where he relinquished the command. *A.* became bankrupt, and did not complete the purchase of the ship, nor pay the residue of the purchase money: Held, first, that an executory contract for the sale of a ship was within the statute 34 G. 3. c. 68. s. 15., and therefore that the contract for the sale of the ship was void for want of an indorsement of the agreement on the certificate of registry.

Held, secondly, in assumption by the assignees of *A.* against *B.*, that the true principle of taking the account between the parties was to charge the assignees for the sum for which the ship might have been let or chartered for such a voyage, with such expenditure (if any) as properly belonged to the freighter of the ship, and such further expence and loss (if any) as *B.* had been put to by the misconduct of *A.* in the management of the ship, and to allow to the assignees of *A.* the sums received by *B.* in respect of the transaction. *Mortimer and Others, Assignees of Merriman, a Bankrupt, v. Fleeming, E. 6 G. 4.*

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2. By power of attorney the colonel of a regiment appointed *A. B.* his true and lawful agent for him, and in his name to ask, demand, and receive from the paymaster-general of the forces, all such pay and allowances as might become due and payable unto him, the colonel, the commissioned officers, non-commissioned officers, and privates of the regiment. *A. B.* having received a sum of money from the paymaster-general under this authority, afterwards became bankrupt, the colonel being then indebted to him for clothing furnished to the regiment: Held, that *A. B.* must be taken to have received the money from the pay-

master-general in his character of agent to the colonel, and that the latter was entitled to set off, in an action brought by the assignees, for a sum due for clothing, the monies received from the paymaster-general by the agent before his bankruptcy. *Knowles and Others, Assignees, v. Sir A. Maitland, Bankrupt, E. 6 G. 4.*

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3. Where *A.* bought of *B.* goods in the *East India Company's* warehouses, and left the warrants in *B.'s* hands, who pledged them, and afterwards became bankrupt, whilst the warrants were in the possession of the pawnee: Held, that the goods were not in the possession, order, and disposition of *B.* at the time of his bankruptcy within the 21 J. 1. c. 19. s. 11., and that they did not pass to the assignees chosen under a commission issued against him. *Greening v. Clark, T. 6 G. 4. 316*
4. The drawer of a bill of exchange became bankrupt, and absconded before it was due, but his house remained open in the possession of a messenger under a commission of bankruptcy issued against him for some time after the bill became due, and before that time the holder of the bill had notice that *A.* and *B.* were chosen assignees of the bankrupt's estate. The acceptor also became bankrupt before the bill was due, and when due it was dishonored. The holder did not give notice of the dishonor to the drawer, or leave it at his house, nor did he make any attempt to give such notice to the assignees of the drawer: Held, that the bill was not proveable under the commission issued against the drawer. *Rhode and Another v. Proctor and Another, T. 6 G. 4. 517*
5. On the 4th of June the plaintiff, in an action of assumpsit, obtained

eviction was tantamount to an entry by the heir.

Semble, That upon the face of the declaration and the deed set out on oyer, (which was thereby made part of the declaration,) the plaintiff had no right of action; for the covenant was to pay rent to the plaintiff and his wife and her heirs, and the plaintiff shewed the death of his wife, whereupon the rent was payable to her heir. *Hill v. Sanders, (in error) T. 6 G. 4.* Page 529

BILL OF EXCHANGE.

1. Where the holder of a bill of exchange, accepted payable at a banker's, but not made payable "there only," did not present it for payment, and the banker about three weeks afterwards failed, having had in his hands during all that time a balance in favor of the acceptor exceeding the amount of the bill: Held, that the latter was not discharged by the omission to present the bill for payment, the acceptance being in law a general acceptance. *Turner v. Hayden and Another, E. 6 G. 4.* 1
2. Where in an action by an indorsee against the indorser of a bill of exchange dishonored on presentment for payment, the declaration contained an averment that the bill was accepted by the drawee: Held, that this was unnecessary, and that the plaintiff need not prove it. *Tanner v. Bean, T. 6 G. 4.* 312
3. Where in an action by the indorsee against the maker of a promissory note payable with interest on demand, the plaintiff having proved that he gave value for it, the defendant tendered evidence of declarations made by the payee when the note was in his possession, that he (the payee)

gave no consideration for it to the maker: Held, that this evidence was inadmissible, as the plaintiff could not be identified with the payee, and the note could not be treated as over-due at the time of the indorsement. *Barough v. White, T. 6 G. 4.* Page 325

4. The owner of a check drawn upon a banker for 50*l.*, having lost it by accident, it was tendered five days after the date to a shopkeeper in payment of goods purchased to the value of 6*l.* 10*s.*, and he gave the purchaser the amount of the check, after deducting the value of the goods purchased. The shopkeeper the next day presented the check at the banker's, and received the amount: Held, that in an action brought by the person who lost the check against the shopkeeper, to recover the value of the check, the jury were properly directed to find for the plaintiff if they thought the defendant had taken the check under circumstances which ought to have excited the suspicion of a prudent man: Held, secondly, that the shopkeeper having taken the check five days after it was due, it was sufficient for the plaintiff to shew that he once had a property in it, without shewing how he lost it. *Down v. Halling, T. 6 G. 4.* 330
5. A notice of dishonor of a bill of exchange, must contain an intimation that payment of the bill has been refused by the acceptor, and, therefore, a letter merely containing a demand of payment, was held not to be a sufficient notice. *Hartley v. Case, the Younger, T. 6 G. 4.* 339
6. Where a bill of exchange was dishonored by the acceptor, and due notice of the dishonor was given to the different parties, and the indorsee having commenced actions by original against the acceptor,

acceptor, and a prior indorser afterwards took from the acceptor a warrant of attorney for the debt and costs, payable by instalments. (The last of the instalments being payable before the time when in the ordinary course of proceedings he could have obtained judgment against the acceptor): Held, in the action against the indorser, that the taking of the warrant of attorney from the acceptor being a matter arising after the commencement of the action, it was no bar to the action generally, and, therefore, that it was not receivable in evidence under the general issue.

Quære, whether the taking of the warrant of attorney from the acceptor, was under the circumstances a giving of time so as to discharge the other parties to the bill. *Lee v. Levy*, T. 6 G. 4.

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7. The drawer of a bill of exchange became bankrupt and absconded before it was due, but his house remained open in the possession of the messenger, under a commission of bankruptcy issued against him, for some time after the bill became due, and before that time, the holder of the bill had notice that A. and B. were chosen assignees of the bankrupt's estate. The acceptor also became bankrupt before the bill was due, and when due it was dishonored. The holder did not give notice of the dishonor to the drawer, or leave it at his house, nor did he make any attempt to give such notice to the assignees of the drawer: Held, that the bill was not proveable under the commission issued against the drawer. *Rhode and Another v. Proctor and Another*, T. 6 G. 4. 517

BOND.

See ANNUITY.

BRIDGE.

BRAWLING.

Where a suit for brawling is instituted before the sary of the bishop of th it may be removed, by request, into the court

Semble, that brawling made an offence by th E. 6. c. 4. but was prevenizable by the spiriti *Ex parte Williams*, T.

BRIDGE.

1. Indictment against a c not repairing a bridge i highway. Plea, that by act of parliament for this road, certain trust directed to lay out the t by granted in repairing t and were empowered to r repair bridges, that the l question was erected by tees under and by virtue act, and that the trust liable and ought to replication, that the trust not liable to repair: H the bridge being built f purposes in a public high common law liability t attached upon the inh the county as soon as it and that the plea was c sufficient to exonerate th did not aver that the tru funds adequate to the the bridge.

Semble, that if that been averred and proved county would have been liable, and must have ta remedy against the trust *King v. The Inhabitant fordshire*, E. 6 G. 4.

2. The inhabitants of a c not bound to widen bridge. *The King v. habitants of the County q* M. 6 G. 4.

Bl

CHRISTIAN NAME, &c.

BROKER.

See PARTNER, 2.

BUILDING ACT.

Where a party raising a party-wall bonâ fide intended to comply with the directions of the building act 14 G. 3. c. 78. but did not in fact do so, and injured the adjoining house, the owner of which brought trespass : Held, that the raising of the wall was to be considered as done in pursuance of the statute, and that the defendant was entitled to the protection given by the 100th section. *Pratt v. Hillman and Others*, T. 6 G. 4.

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CERTIORARI.

1. Where a certiorari issued to remove a cause from an inferior court, and the court below returned a copy of the record, and not the record itself, this court quashed the writ and return, and awarded a procedendo. *Palmer and another v. Forsyth and Bell*, T. 6 G. 4. 401
2. Where a defendant removes a cause from an inferior court by certiorari, the plaintiff is not bound to follow the suit, and the defendant cannot sign judgment of nonpros for want of a declaration. *Clerk v. The Mayor, &c. of Berwick*, M. 6 G. 4. 649

CHARTER.

See CORPORATION.

CHECK.

See BILL OF EXCHANGE, 4.

CHRISTIAN NAME, INITIALS OF.

See PLEADING, 50.

CONSTABLE.

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CLERK OF THE PEACE.

See AGREEMENT.

COAL ACT.

See PLEADING, 9.

COMPOSITION, AGREEMENT FOR.

In an action on a promissory note against a party who had indorsed it for the accommodation of the maker, it appeared that the plaintiff, the indorsee, had signed an agreement to accept from the maker of the note 5s. in the pound in full of his demand, on having a collateral security for that sum from a third person. It further appeared that the agent of the maker had represented to the plaintiff, before he signed the agreement, that the defendant would continue liable for the residue of the debt secured by the note, and that the agreement would be void unless all the creditors signed : Held, first, that the execution of this agreement had the effect of discharging the surety ; secondly, that the representations being as to the legal effect of the agreement, were immaterial, and had not the effect of avoding it ; and that as the latter of them gave to the agreement a meaning different from that which appeared upon the face of it, parol evidence of that representation was not admissible, per *Bayley J. Lewis v. Jones*, T. 6 G. 4. 506

CONSTABLE.

See TRESPASS, 4.

A person is not liable to serve the office of constable unless he be resiant in the parish, and therefore a person occupying a house, and paying all parish rates in respect of it, and carrying on the trade

gesses, and notice of holding the court has been immemorially given *by ringing a certain bell within the town and borough*; and that the burgesses, or so many of them as choose, have a right to attend that court; and being present attending there, have elected, and have a right to elect at their discretion, such persons to be burgesses as they think fit; that before the information, to wit, on, &c. notice of holding the court was given by ringing the bell, that the court was holden, and the defendant elected a burgess. Plea, second, set out a charter of *Ed. 6.*, and that from the time of the charter the mode of electing burgesses hath been for the mayor, bailiffs, and burgesses, being met and assembled for that purpose at a certain court holden in and for the town and borough before the mayor and bailiffs, (notice having been given of holding the said court by the ringing of a certain bell within the town and borough,) have elected burgesses at their discretion; that the mayor, bailiffs, and burgesses being in due manner met and assembled at the said court, holden before the mayor, &c. for the election of burgesses (notice having been given of holding the court by ringing the bell) elected defendant a burgess. Plea, third, recited the charter, and averred that it contained no direction as to the election of burgesses; that the mayor, bailiffs, and burgesses, &c. met and assembled at a court holden before the mayor and bailiffs for the election of burgesses (notice having been given of holding the court by ringing a bell) elected the defendant a burgess. Plea, fourth, that the mayor, bailiffs, and burgesses being met and assembled for that purpose at a meeting of the corporation at the

Guildhall, have from time immemorial elected burgesses; and that notice of holding such meeting during all the time aforesaid hath been given, and ought to have been given, by ringing a certain bell within the said town and borough. Pleas fifth and sixth varied from the second and third only by substituting "met and assembled for that purpose at the Guildhall," for "at a certain court holden, &c." Seventh plea set out a custom to hold a court before the mayor and bailiffs every *Monday*, and that the burgesses for the time being "being met and assembled for that purpose," at the said court, have elected burgesses; that on, &c. the said court was holden for the election of burgesses, and that the burgesses "then and there so met and assembled together as aforesaid," elected the defendant. Plea, eighth, set out a non-existent by-law, providing for the election of burgesses in the same manner as by the custom set out in the first plea: Held, that all the pleas were bad. The first six and last because the notice by the ringing of the bell of holding the courts or meetings in those pleas mentioned as there described, was not a reasonable notice of the courts or meetings, or of the purposes for which they were holden, and was therefore insufficient; and the seventh because it did not state that the *Monday's* court was always holden for the purposes of election; and notice of the intended election was not stated as a part of the custom, which was therefore unreasonable. Secondly because the defendant did not in stating his election, bring himself within the custom. Replication to the seventh plea that the burgesses met and assembled at the said court as in the seventh plea mentioned, were not in due man-

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held that the plaintiff was not entitled to costs. *Skaddick, Administratrix, v. Bennet*, M. 6 G. 4.

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4. Where a Court of Requests' Act enables a defendant to deprive a plaintiff of his costs, if he sues in a superior court, the defendant must make his application for that purpose promptly, and where a motion to enter a suggestion to deprive the plaintiff of costs might have been made in *Easter* term, but, instead of that, a negotiation respecting the costs was then entered into, and the motion was made in *Trinity* term: Held, that it was too late. *Hippesley v. Layng*, M. 6 G. 4. 865

5. Where a defendant in replevin avows as landlord for rent in arrear, and obtains a verdict, he is entitled to double costs, although the action be really and bonâ fide brought to try the title to the land.

The true mode of estimating the amount of double costs, is, first, to allow the defendant the single costs, including the expenses of witnesses, counsel's fees, &c., and then to allow him one-half of the amount of the single costs, without making any deduction on account of counsels' or court fees, &c. *Staniland v. Ludlam*, M. 6 G. 4. 889

COVENANT.

1. Where one of five tenants in common brought covenant on a lease for rent, payable on the four most usual days of payment in the year, and the breach was that on the 24th day of *June* 1824, a large sum of money, to wit, the sum of 21l. 15s., one-fifth part of the rent for three quarters of a year of the term then elapsed, became due from the defendant to the plaintiff, and still was in arrear:

Held, good upon special demurrer. *Henniker v. Turner*, E. 6 G. 4. Page 157

2. *A.* being seised in fee of an estate, by lease and release executed upon his marriage, settled the same upon himself for life, remainder to his first and other sons in tail, with a power to the tenant for life, to grant leases for years, determinable on three lives. *A.* afterwards granted a lease of part of the estate in question for the lives of three persons therein named, and the life of the survivor; and there was a covenant that the lessee should quietly hold and enjoy the premises *for and during the said term*, without interruption of the lessor, his heirs, or assigns, or any other person claiming any estate, right, or interest by, from, or under him or any of his ancestors. The lease being for three lives absolutely, was not conformable to the power and, became void on the death of *A.*; and his eldest son brought an ejectment, and evicted the lessee, two of the cestui qui vies being then living: Held, that the eldest son was a person claiming under the lessor within the meaning of the covenant for quiet enjoyment: Held, secondly, that by the words *during the said term* in that covenant the parties intended a term to continue so long as the cestui que vies survived, and not a term to continue only for the life of the grantor. *Evans v. Vaughan*, T. 6 G. 4. 261

3. *A.*, who held an office for life in the gift of *B.*, agreed with *C.* to resign, and to procure the appointment for him, and *C.*, in consideration thereof, agreed that *A.* should have a moiety of the profits. *A.* resigned, and through his influence *C.* was appointed, and executed a deed for the performance of the agreement. The agreement

DEBT.

COURT OF REQUESTS.

See COSTS, 3.

CUSTOM.

In an action for a false return to a writ of mandamus, it was alleged to be a custom in a parish, that whenever a certain perpetual curacy should be vacant by reason of the death of the curate or otherwise, the parishioners should elect a fit person to succeed him; and that a vacancy having occurred, plaintiff was duly elected by the parishioners according to the custom. At the trial, it appeared that at a meeting of the parishioners, duly convened for the purpose of such an election, it was decided before the election began, that parishioners who had not paid church rates should not be allowed to vote. In consequence of this resolution, several persons who had the legal right of voting, did not tender their votes, and the votes of others who did tender their votes were rejected on the ground that they had not paid the church rate: Held, that a party elected by a majority of the persons whose votes were received at this meeting was not duly elected by the parishioners according to the custom.

At the election, every parishioner tendering a vote gave a card, containing only the name of the candidate for whom he voted. Semble, that this mode of election was illegal. *Faulkner v. Elger*, T. 6 G. 4. Page 449

DAMAGES.

See PRACTICE, 4.

DATE.

See DEED, 2.

DEBT.

See PLEADING, 55.

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DEED.

See STAMP.

1. By lease and re-lease dated 1773, *A. B.*, lord of the manors of *M. H.* and *P. P.*, bargained and sold unto *C. D.*, *E. F.*, and *G. H.*, "all that messuage, tenement, boat-house, &c., and also all that and those, the sea grounds, oyster layings, shores, and fisheries of him, *A. B.*, commonly called and known by the name and names of *M. H.* and *P. P.* shores or sea grounds, with full and free liberty to *C. D.*, *E. F.*, and *G. H.*, and their heirs and assigns for ever, to fish, dredge, and lay oysters thereon, and from thence to take and carry away the same, which said sea grounds, oyster layings, shores and fisheries extended from the south at low water mark, to the north at high water mark, and from certain sea grounds on the east to other sea grounds on the west. And all which said sea grounds, oyster layings, shores, and fisheries, thereby granted, re-leased, &c., contained in the whole by estimation 800 acres of land covered with water, or thereabouts, as the same were beaconed, marked, and stubbed out. Reservation to the grantor, his heirs and assigns, lord of the two manors, of all manner of fish royal, and all wrecks of the sea, flotsam, jetsam, and ligan within the said manors, and all manner of franchises." And by the tenendum, the grantees were to hold the messuage, tenement, and boat-house, sea grounds, oyster layings, shores, or fisheries, hereditaments, and premises, with the appurtenances, of the grantor, lord of the two manors by such suit of court and other services as were, or of right ought to be done and performed by other the freehold tenants of the same respective manors seised of estates of

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" Item. I give and bequeath unto *C. D.* all that my messuage and tenement wherein I now dwell, with the garden and all the appurtenances thereto belonging; and I also give to the said *C. D.* all my household goods and chattels, and implements of household, within doors and without, all for her own disposing, free will, and pleasure, immediately after my decease:" Held, that *C. D.* took only an estate for life in the premises devised to her. *Doe on the demise of Ellam v. Westley, M. 6 G. 4.* Page 667

DISTRESS.

Where a tenant, by permission of the landlord, remained in possession of part of a farm after the expiration of the tenancy: Held, that the landlord might distrain on that part within six months after the expiration of the tenancy, the 8 *Ann. c. 14. ss. 6 & 7.* not being confined to tortious holding, over or to the holding of the whole farm. *Nuttall v. Staunton, E. 6 G. 4.* 51

EJECTMENT.

1. In ejectment for premises which had been demised on lease to one person who had underlet to others, it was held to be necessary to serve all the undertenants with a copy of the declaration.
Where the tenant of a house locked it up and quitted it, and the landlord, three months afterwards, fixed a copy of a declaration in ejectment to the door: Held, that the service was not sufficient, but that the landlord should have treated it as a vacant possession. *Doe on the demise of Lord Darlington v. Cock and Others, E. 6 G. 4.* 259
2. Where a lease contained cove-

nants to keep the premises in repair, and to repair within three months after notice, and a clause of re-entry for breach of any covenant, and the premises being out of repair, the landlord gave a notice to repair within three months: Held, that this was a waiver of the forfeiture incurred by breach of the general covenant to keep the premises in repair, and that the landlord could not bring ejectment until after the expiration of the three months. *Doe on the demise of Morecroft v. Meux and Others, T. 6 G. 4.*

Page 606

3. Copyhold lands were granted to *A.* for the lives of herself and *B.*, and in reversion to *C.* for other lives. *A.* died, having devised to *B.*, who entered and kept possession for more than twenty years. On his death *C.* brought ejectment: Held, that the action was barred by the statute of limitations, for that *C.*'s right of possession accrued on the death of *A.*, inasmuch as there cannot be a general occupant of copyhold land. *Doe on the several demises of Foster and Others v. Scott, M. 6 G. 4.* 706.
4. Where, in ejectment, a person obtains a rule to defend as landlord, the plaintiff nevertheless may sign judgment against the casual ejector, but may not take out execution without further order: Held, that after verdict and judgment against the landlord, execution may be issued against him without any further order of the court. *Doe dem. Lucy v. Bennett, M. 6 G. 4.* 897

ELECTION OF CURATE.

See MANDAMUS, 1.

ESCAPE.

See PLEADING, 28.

eviction was tantamount to an entry by the heir.

Semble, That upon the face of the declaration and the deed set out on oyer, (which was thereby made part of the declaration,) the plaintiff had no right of action; for the covenant was to pay rent to the plaintiff and his wife and her heirs, and the plaintiff shewed the death of his wife, whereupon the rent was payable to her heir. *Hill v. Sanders, (in error) T. 6 G. 4.* Page 529

BILL OF EXCHANGE.

1. Where the holder of a bill of exchange, accepted payable at a banker's, but not made payable "there only," did not present it for payment, and the banker about three weeks afterwards failed, having had in his hands during all that time a balance in favor of the acceptor exceeding the amount of the bill: Held, that the latter was not discharged by the omission to present the bill for payment, the acceptance being in law a general acceptance. *Turner v. Hayden and Another, E. 6 G. 4.* 1
2. Where in an action by an indorsee against the indorser of a bill of exchange dishonored on presentment for payment, the declaration contained an averment that the bill was accepted by the drawee: Held, that this was unnecessary, and that the plaintiff need not prove it. *Tanner v. Bean, T. 6 G. 4.* 312
3. Where in an action by the indorsee against the maker of a promissory note payable with interest on demand, the plaintiff having proved that he gave value for it, the defendant tendered evidence of declarations made by the payee when the note was in his possession, that he (the payee)

gave no consideration for it to the maker: Held, that this evidence was inadmissible, as the plaintiff could not be identified with the payee, and the note could not be treated as over-due at the time of the indorsement. *Barough v. White, T. 6 G. 4.* Page 325

4. The owner of a check drawn upon a banker for 50*l.*, having lost it by accident, it was tendered five days after the date to a shopkeeper in payment of goods purchased to the value of 6*l.* 10*s.*, and he gave the purchaser the amount of the check, after deducting the value of the goods purchased. The shopkeeper the next day presented the check at the banker's, and received the amount: Held, that in an action brought by the person who lost the check against the shopkeeper, to recover the value of the check, the jury were properly directed to find for the plaintiff if they thought the defendant had taken the check under circumstances which ought to have excited the suspicion of a prudent man: Held, secondly, that the shopkeeper having taken the check five days after it was due, it was sufficient for the plaintiff to shew that he once had a property in it, without shewing how he lost it. *Down v. Halling, T. 6 G. 4.* 330
5. A notice of dishonor of a bill of exchange, must contain an intimation that payment of the bill has been refused by the acceptor, and, therefore, a letter merely containing a demand of payment, was held not to be a sufficient notice. *Hartley v. Case, the Younger, T. 6 G. 4.* 339
6. Where a bill of exchange was dishonored by the acceptor, and due notice of the dishonor was given to the different parties, and the indorsee having commenced actions by original against the acceptor,

acceptor, and a prior indorser afterwards took from the acceptor a warrant of attorney for the debt and costs, payable by instalments. (The last of the instalments being payable before the time when in the ordinary course of proceedings he could have obtained judgment against the acceptor): Held, in the action against the indorser, that the taking of the warrant of attorney from the acceptor being a matter arising after the commencement of the action, it was no bar to the action generally, and, therefore, that it was not receivable in evidence under the general issue.

Quære, whether the taking of the warrant of attorney from the acceptor, was under the circumstances a giving of time so as to discharge the other parties to the bill. *Lee v. Levy*, T. 6 G. 4.

Page 390

7. The drawer of a bill of exchange became bankrupt and absconded before it was due, but his house remained open in the possession of the messenger, under a commission of bankruptcy issued against him, for some time after the bill became due, and before that time, the holder of the bill had notice that A. and B. were chosen assignees of the bankrupt's estate. The acceptor also became bankrupt before the bill was due, and when due it was dishonored. The holder did not give notice of the dishonor to the drawer, or leave it at his house, nor did he make any attempt to give such notice to the assignees of the drawer: Held, that the bill was not proveable under the commission issued against the drawer. *Rhode and Another v. Proctor and Another*, T. 6 G. 4. 517

BOND.

See ANNUITY.

BRIDGE.

BRAWLING.

Where a suit for brawling is instituted before the sary of the bishop of the it may be removed, by request, into the court.

Semble, that brawling made an offence by the E. 6. c. 4. but was preventizable by the spirit *Ex parte Williams*, T.

BRIDGE.

1. Indictment against a person not repairing a bridge on a highway. Plea, that by act of parliament for this road, certain trustees directed to lay out the money by granted in repairing, and were empowered to repair bridges, that the question was erected by trustees under and by virtue act, and that the trustees liable and ought to repair, that the trustees not liable to repair: For the bridge being built for purposes in a public highway common law liability attached upon the inhabitants of the county as soon as it was built and that the plea was sufficient to exonerate the trustees did not aver that the trustees funds adequate to the repair of the bridge.

Semble, that if that been averred and proved the county would have been liable, and must have taken remedy against the trustees *King v. The Inhabitants of Dorsetshire*, E. 6 G. 4.

2. The inhabitants of a county not bound to widen a bridge. *The King v. The Inhabitants of the County of Middlesex*, M. 6 G. 4.

CHRISTIAN NAME, &c.

BROKER.

See PARTNER, 2.

BUILDING ACT.

Where a party raising a party-wall bonâ fide intended to comply with the directions of the building act 14 G. 3. c. 78. but did not in fact do so, and injured the adjoining house, the owner of which brought trespass : Held, that the raising of the wall was to be considered as done in pursuance of the statute, and that the defendant was entitled to the protection given by the 100th section. *Pratt v. Hillman and Others*, T. 6 G. 4.

Page 269

CERTIORARI.

1. Where a certiorari issued to remove a cause from an inferior court, and the court below returned a copy of the record, and not the record itself, this court quashed the writ and return, and awarded a procedendo. *Palmer and another v. Forsyth and Bell*, T. 6 G. 4. 401
2. Where a defendant removes a cause from an inferior court by certiorari, the plaintiff is not bound to follow the suit, and the defendant cannot sign judgment of nonpros for want of a declaration. *Clerk v. The Mayor, &c. of Berwick*, M. 6 G. 4. 649

CHARTER.

See CORPORATION.

CHECK.

See BILL OF EXCHANGE, 4.

CHRISTIAN NAME, INITIALS OF.

See PLEADING, 50.

CONSTABLE.

983

CLERK OF THE PEACE.

See AGREEMENT.

COAL ACT.

See PLEADING, 9.

COMPOSITION, AGREEMENT FOR.

In an action on a promissory note against a party who had indorsed it for the accommodation of the maker, it appeared that the plaintiff, the indorsee, had signed an agreement to accept from the maker of the note 5s. in the pound in full of his demand, on having a collateral security for that sum from a third person. It further appeared that the agent of the maker had represented to the plaintiff, before he signed the agreement, that the defendant would continue liable for the residue of the debt secured by the note, and that the agreement would be void unless all the creditors signed : Held, first, that the execution of this agreement had the effect of discharging the surety ; secondly, that the representations being as to the legal effect of the agreement, were immaterial, and had not the effect of avoding it ; and that as the latter of them gave to the agreement a meaning different from that which appeared upon the face of it, parol evidence of that representation was not admissible, per *Bayley J. Lewis v. Jones*, T. 6 G. 4. 506

CONSTABLE.

See TRESPASS, 4.

A person is not liable to serve the office of constable unless he be resiant in the parish, and therefore a person occupying a house, and paying all parish rates in respect of it, and carrying on the trade

trade of a printer, frequenting the house daily on all working days, and sometimes remaining there during the night at work, but not sleeping in the house, is not liable to serve the office of constable in the parish where the house is situate. *Rex v. Adlard*, M. 6 G. 4. Page 772

COPYHOLD.

Copyhold lands were granted to A. for the lives of herself and B., and in reversion to C. for other lives. A. died, having devised to B., who entered and kept possession for more than 20 years. On his death C. brought ejectment: Held, that the action was barred by the statute of limitations, for that C.'s right of possession accrued on the death of A., inasmuch as there cannot be a general occupant of copyhold land. *Doe on the demise of Foster and Others v. Scott*, M. 6 G. 4. 706

CORPORATION.

See PLEADING, 55.

1. Quo warranto for usurping the office of bailiff of the borough of Stockbridge, being an office of great trust and pre-eminence within the borough, touching the rule and government of the borough, and the election and return of burgesses to serve for the commons in parliament for the said borough. The defendant's pleas shewed that he had been elected to the office, and traversed "that the office of bailiff was an office touching the rule and government of the borough." There were general replications taking issue upon all the facts stated as inducement to the defendant's traverse, (but they did not notice the traverse) and special replications setting up various customs as to the election of bailiffs of the borough. Demurrer and Joinder: Held, that the defend-

ant not having traversed the office "was one of pre-eminence within the borough touching the election of burgesses to serve for the commons," had admitted and that for such an office a warrant would lie; and that the general replication was clearly good, and that being to all the replication must be given.

Quære, Whether the replications were good. *v. M'Kay*, T. 6 G. 4.

2. Information in the quo warranto for an office of mayor of Plea, that the defendant elected according to the charter of the borough, that the defendant was a candidate; that 50 persons tendered for the office, were improperly rejected that 38 persons, who were unduly elected and burgesses, were received for the defendant, a majority of the legal voters was in favor of the defendant. On demurrer that the replication was bad, that it was only an argument and not a direct denial of the defendant and also for that it put in issue the title of the corporation (corporators de facto) and not be done in an information against the elected. *T. Hughes*, T. 6 G. 4.

3. Information for usurping the office of burgess of the borough of M. Plea, first, that the defendant was an ancient borough, and that the defendant was a corporation by charter, consisting of an ancient borough, and that from time immemorial a court has from time been holden (among other things) for the election

gesses, and notice of holding the court has been immemorially given by ringing a certain bell within the town and borough; and that the burgesses, or so many of them as choose, have a right to attend that court; and being present attending there, have elected, and have a right to elect at their discretion, such persons to be burgesses as they think fit; that before the information, to wit, on, &c. notice of holding the court was given by ringing the bell, that the court was holden, and the defendant elected a burgess. Plea, second, set out a charter of *Ed. 6.*, and that from the time of the charter the mode of electing burgesses hath been for the mayor, bailiffs, and burgesses, being met and assembled for that purpose at a certain court holden in and for the town and borough before the mayor and bailiffs, (notice having been given of holding the said court by the ringing of a certain bell within the town and borough,) have elected burgesses at their discretion; that the mayor, bailiffs, and burgesses being in due manner met and assembled at the said court, holden before the mayor, &c. for the election of burgesses (notice having been given of holding the court by ringing the bell) elected defendant a burgess. Plea, third, recited the charter, and averred that it contained no direction as to the election of burgesses; that the mayor, bailiffs, and burgesses, &c. met and assembled at a court holden before the mayor and bailiffs for the election of burgesses (notice having been given of holding the court by ringing a bell) elected the defendant a burgess. Plea, fourth, that the mayor, bailiffs, and burgesses being met and assembled for that purpose at a meeting of the corporation at the

Guildhall, have from time immemorial elected burgesses; and that notice of holding such meeting during all the time aforesaid hath been given, and ought to have been given, by ringing a certain bell within the said town and borough. Pleas fifth and sixth varied from the second and third only by substituting "met and assembled for that purpose at the Guildhall," for "at a certain court holden, &c." Seventh plea set out a custom to hold a court before the mayor and bailiffs every *Monday*, and that the burgesses for the time being "being met and assembled for that purpose," at the said court, have elected burgesses; that on, &c. the said court was holden for the election of burgesses, and that the burgesses "then and there so met and assembled together as aforesaid," elected the defendant. Plea, eighth, set out a non-existent by-law, providing for the election of burgesses in the same manner as by the custom set out in the first plea: Held, that all the pleas were bad. The first six and last because the notice by the ringing of the bell of holding the courts or meetings in those pleas mentioned as there described, was not a reasonable notice of the courts or meetings, or of the purposes for which they were holden, and was therefore insufficient; and the seventh because it did not state that the *Monday's* court was always holden for the purposes of election; and notice of the intended election was not stated as a part of the custom, which was therefore unreasonable. Secondly because the defendant did not in stating his election, bring himself within the custom. Replication to the seventh plea that the burgesses met and assembled at the said court as in the seventh plea mentioned, were not in due man-

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ner met and assembled for the election of burgesses.

General demurrer and joinder, semble, that this replication was good. *The King v. Hill*, T. 6 G. 4.

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4. The 59 G. 3. c. 12. s. 17. vests in the churchwardens and overseers of the poor, in the nature of a body corporate, all buildings, lands, and hereditaments belonging to the parish: Held, that in order to constitute the body corporate, intended by the act, there must be two overseers and a churchwarden or churchwardens, and that where there were two overseers appointed, one of whom was afterwards appointed (by custom) sole churchwarden, the act did not vest parish property in them. *Woodcock v. Gibson and Others*, T. 6 G. 4. 462

5. A charter granted by the crown to a corporation cannot be partially accepted, whether it be a charter of creation, or granted to a pre-existing corporation.

The power to make bye-laws is incident to the whole body of every corporation, and, therefore, if a charter give to a select body power to make bye-laws touching certain matters therein specified, that does not take away from the body at large their incidental power to make bye-laws touching other matters not specified in the charter.

Where a corporation consisted of mayor, bailiffs, aldermen, and burgesses, (of whom the bailiffs and aldermen were chosen out of the burgesses, and formed a common council,) and the charter gave to the mayor and burgesses power to elect burgesses, and the corporation at large made a bye-law vesting the right to elect burgesses in the mayor and common council: Held, that the bye-law was good, the burgesses at large

being represented by council, inasmuch as and aldermen who common council were amongst the burgesses, *royd and Littledale* tiente, *Bayley J. Abb* bitante. *Rex v. W* 6 G. 4.

COSTS.

1. Covenant against exequene administravit, as At the trial, the defend a plea puis darrien to which the plaintiff defendants demurred cation. Judgment for ants on the demurrer: they were entitled to curred after the plea continuance, but not of the whole cause. *Cross and Another*, E. 6 G. 4.
2. Where notice of app an order for diverting was given, and the or filed with the clerk of for enrolment, but t who made it, before quarter sessions, gave lant notice that they the order: Held, that at sessions had no pow to the appellant the co paring to try the ap *King v. Wing*, E. 6 G.
3. The sum recovered b to be considered the which the action is bro the *London Court of* Act, 39 & 40 G. 3. c. and, therefore, where debt (which exceede contracted more than before the commencem action, and the plaintiff to a plea of the statut ations, proved a pron six years as to 34. or

held that the plaintiff was not entitled to costs. *Skaddick, Administratrix, v. Bennet, M. 6 G. 4.*

Page 769

4. Where a Court of Requests' Act enables a defendant to deprive a plaintiff of his costs, if he sues in a superior court, the defendant must make his application for that purpose promptly, and where a motion to enter a suggestion to deprive the plaintiff of costs might have been made in *Easter* term, but, instead of that, a negotiation respecting the costs was then entered into, and the motion was made in *Trinity* term: Held, that it was too late. *Hippesley v. Layng, M. 6 G. 4.* 865

5. Where a defendant in replevin avows as landlord for rent in arrear, and obtains a verdict, he is entitled to double costs, although the action be really and bonâ fide brought to try the title to the land.

The true mode of estimating the amount of double costs, is, first, to allow the defendant the single costs, including the expences of witnesses, counsel's fees, &c., and then to allow him one-half of the amount of the single costs, without making any deduction on account of counsels' or court fees, &c. *Staniland v. Ludlam, M. 6 G. 4.* 889

COVENANT.

1. Where one of five tenants in common brought covenant on a lease for rent, payable on the four most usual days of payment in the year, and the breach was that on the 24th day of *June* 1824, a large sum of money, to wit, the sum of 21*l.* 15*s.*, one-fifth part of the rent for three quarters of a year of the term then elapsed, became due from the defendant to the plaintiff, and still was in arrear:

Held, good upon special demurrer. *Henniker v. Turner, E. 6 G. 4.* Page 157

2. *A.* being seised in fee of an estate, by lease and release executed upon his marriage, settled the same upon himself for life, remainder to his first and other sons in tail, with a power to the tenant for life, to grant leases for years, determinable on three lives. *A.* afterwards granted a lease of part of the estate in question for the lives of three persons therein named, and the life of the survivor; and there was a covenant that the lessee should quietly hold and enjoy the premises *for and during the said term*, without interruption of the lessor, his heirs, or assigns, or any other person claiming any estate, right, or interest by, from, or under him or any of his ancestors. The lease being for three lives absolutely, was not conformable to the power and, became void on the death of *A.*; and his eldest son brought an ejectment, and evicted the lessee, two of the cestui qui vies being then living: Held, that the eldest son was a person claiming under the lessor within the meaning of the covenant for quiet enjoyment: Held, secondly, that by the words *during the said term* in that covenant the parties intended a term to continue so long as the cestui que vies survived, and not a term to continue only for the life of the grantor. *Evans v. Vaughan, T. 6 G. 4.* 261

3. *A.*, who held an office for life in the gift of *B.*, agreed with *C.* to resign, and to procure the appointment for him, and *C.*, in consideration thereof, agreed that *A.* should have a moiety of the profits. *A.* resigned, and through his influence *C.* was appointed, and executed a deed for the performance of the agreement. The agreement

agreement was not communicated to *B.* In covenant by *A.* against *C.* for not paying over to him a moiety of the profits of the office: Held, that the agreement was a fraud upon *B.*, and, therefore, illegal and void. *Waldo v. Martin*, *T. 6 G. 4.*

Page 319

4. Covenant for non-payment of rent, stating, that plaintiff and his wife, since deceased, demised certain premises to defendant for years, reddendum to plaintiff and his wife, 2*l.* per annum, and a covenant to pay the rent to the plaintiff and his wife. Averment, that on, &c., the wife died, and that afterwards, to wit, on &c., 2*l.* of the rent aforesaid became due and in arrear to the plaintiff. By the lease set out on oyer it appeared that the reddendum was to the husband and wife, and the heirs of the wife, and the covenant to pay rent was in the same form. Plea, that the premises were the estate of the wife, and that the plaintiff had nothing in them, but in right of his wife, that on, &c., she died without issue, leaving *J. A.* her heir, whereupon all the estate of the plaintiff ceased, and *J. A.* threatened to enter and eject defendant, unless he attorned, whereby he was compelled to attorn, and became tenant to *J. A.* General demurrer and joinder: Held, that the plea was good, for that some interest having passed by the lease from the plaintiff and his wife, it could not work by estoppel, and the defendant was therefore entitled to shew that the plaintiff's interest had ceased; and also that the attornment upon the threat of eviction was tantamount to an entry by the heir.

Semble, that upon the face of the declaration and the deed set out on oyer (which was thereby made part of the declaration) the plaintiff had no right of action;

for the covenant was to the plaintiff and her heirs, and the plea the death of his wife the rent was payable. *Hill v. Saunders*, *6 G. 4.*

5. Where a lease covenants to keep premises and to repair within after notice, and an entry for breach of and the premises be pair, the landlord grants repair within three years that this was a waiver of forfeiture incurred by the covenant to keep the repair, and that the landlord not bring ejectment upon expiration of the term. *Doe on the demise v. Meux*, *T. 6 G. 4.*

6. Where in covenant craves oyer of the deed, and pleads non est, the deed so set out part of the declaration only question at the trial that issue is, whether the deed so set out, was executed by the defendant.

Covenant to deliver premises sufficient for the repairs (growing on the premises) for the repairs. Averment, that there was growing on the premises timber sufficient for the repairs, but not delivered it. Plea, that the premises were not timber growing on the premises sufficient for the repairs. Issue, whether the timber should be of a certain quality as well as quantity. Held, that the plea was good, for that the plaintiff had been demurred to for stating that there was growing on the premises timber sufficient for any repairs. *Snell v. Snell*, *M. 6 G. 4.*

DEBT.

COURT OF REQUESTS.

See COSTS, 3.

CUSTOM.

In an action for a false return to a writ of mandamus, it was alleged to be a custom in a parish, that whenever a certain perpetual curacy should be vacant by reason of the death of the curate or otherwise, the parishioners should elect a fit person to succeed him; and that a vacancy having occurred, plaintiff was duly elected by the parishioners according to the custom. At the trial, it appeared that at a meeting of the parishioners, duly convened for the purpose of such an election, it was decided before the election began, that parishioners who had not paid church rates should not be allowed to vote. In consequence of this resolution, several persons who had the legal right of voting, did not tender their votes, and the votes of others who did tender their votes were rejected on the ground that they had not paid the church rate: Held, that a party elected by a majority of the persons whose votes were received at this meeting was not duly elected by the parishioners according to the custom.

At the election, every parishioner tendering a vote gave a card, containing only the name of the candidate for whom he voted. Semble, that this mode of election was illegal. *Faulkner v. Elger*, T. 6 G. 4. Page 449

DAMAGES.

See PRACTICE, 4.

DATE.

See DEED, 2.

DEBT.

See PLEADING, 55.

VOL. IV.

DEED.

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DEED.

See STAMP.

1. By lease and re-lease dated 1773, *A. B.*, lord of the manors of *M. H.* and *P. P.*, bargained and sold unto *C. D.*, *E. F.*, and *G. H.*, "all that messuage, tenement, boat-house, &c., and also all that and those, the sea grounds, oyster layings, shores, and fisheries of him, *A. B.*, commonly called and known by the name and names of *M. H.* and *P. P.* shores or sea grounds, with full and free liberty to *C. D.*, *E. F.*, and *G. H.*, and their heirs and assigns for ever, to fish, dredge, and lay oysters thereon, and from thence to take and carry away the same, which said sea grounds, oyster layings, shores and fisheries extended from the south at low water mark, to the north at high water mark, and from certain sea grounds on the east to other sea grounds on the west. And all which said sea grounds, oyster layings, shores, and fisheries, thereby granted, re-leased, &c., contained in the whole by estimation 800 acres of land covered with water, or thereabouts, as the same were beaconed, marked, and stubbed out. Reservation to the grantor, his heirs and assigns, lord of the two manors, of all manner of fish royal, and all wrecks of the sea, flotsam, jetsam, and ligan within the said manors, and all manner of franchises." And by the tenendum, the grantees were to hold the messuage, tenement, and boat-house, sea grounds, oyster layings, shores, or fisheries, hereditaments, and premises, with the appurtenances, of the grantor, lord of the two manors by such suit of court and other services as were, or of right ought to be done and performed by other the freehold tenants of the same respective manors seised of estates of

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"Item. I give and bequeath unto C. D. all that my messuage and tenement wherein I now dwell, with the garden and all the appurtenances thereto belonging; and I also give to the said C. D. all my household goods and chattels, and implements of household, within doors and without, all for her own disposing, free will, and pleasure, immediately after my decease:" Held, that C. D. took only an estate for life in the premises devised to her. *Doe on the demise of Ellam v. Westley, M.* 6 G. 4. Page 667

DISTRESS.

Where a tenant, by permission of the landlord, remained in possession of part of a farm after the expiration of the tenancy: Held, that the landlord might distrain on that part within six months after the expiration of the tenancy, the 8 Ann. c. 14. ss. 6 & 7. not being confined to tortious holding, over or to the holding of the whole farm. *Nuttall v. Staunton, E.* 6 G. 4. 51

EJECTMENT.

1. In ejectment for premises which had been demised on lease to one person who had underlet to others, it was held to be necessary to serve all the undertenants with a copy of the declaration.

Where the tenant of a house locked it up and quitted it, and the landlord, three months afterwards, fixed a copy of a declaration in ejectment to the door: Held, that the service was not sufficient, but that the landlord should have treated it as a vacant possession. *Doe on the demise of Lord Darlington v. Cock and Others, E.* 6 G. 4. 259

2. Where a lease contained cove-

nants to keep the premises in repair, and to repair within three months after notice, and a clause of re-entry for breach of any covenant, and the premises being out of repair, the landlord gave a notice to repair within three months: Held, that this was a waiver of the forfeiture incurred by breach of the general covenant to keep the premises in repair, and that the landlord could not bring ejectment until after the expiration of the three months. *Doe on the demise of Morecroft v. Meux and Others, T.* 6 G. 4.

Page 606

3. Copyhold lands were granted to A. for the lives of herself and B., and in reversion to C. for other lives. A. died, having devised to B., who entered and kept possession for more than twenty years. On his death C. brought ejectment: Held, that the action was barred by the statute of limitations, for that C.'s right of possession accrued on the death of A., inasmuch as there cannot be a general occupant of copyhold land. *Doe on the several demises of Foster and Others v. Scott, M.* 6 G. 4. 706
4. Where, in ejectment, a person obtains a rule to defend as landlord, the plaintiff nevertheless may sign judgment against the casual ejector, but may not take out execution without further order: Held, that after verdict and judgment against the landlord, execution may be issued against him without any further order of the court. *Doe dem. Lucy v. Bennett, M.* 6 G. 4. 897

ELECTION OF CURATE.

See MANDAMUS, 1.

ESCAPE.

See PLEADING, 28,

§ T 2

EVI.

by testator or the defendants since his death. Plea, first, non-assumpsit testator. Secondly, that the note became due and payable to J. Y. in his life-time, and that the causes of action did not accrue to him within six years before the exhibiting of the bill; upon which plea issue was taken and joined. Thirdly, nul tiel record of the inquisition taken before the coroner, upon which issue was taken. Fourthly, that there was no such grant as alleged in the declaration. The issue on the plea of the statute of limitations having been found for the defendants, and all the other issues for the plaintiff, it was held, on motion to enter a nonsuit, first, that it was not necessary for the plaintiff to produce at the trial the inquisition mentioned in the king's grant, inasmuch as that was an office of instruction only, and not of entitling; the title of the crown having accrued by the felony under the coroner's inquisition. Secondly, that the grant under the sign manual was sufficient to pass the property in the note.

Held, thirdly, assuming it to be necessary in order to vest the chattels of a felo de se in the crown, that the coroner's inquest should be found by twelve men, that it must be taken after verdict that the inquest was so found. *Lambert v. Taylor and Another, Executors*, E. 6 G. 4. Page 198

7. Plaintiff claimed a right of common for all his commonable cattle. The proof was, that he had turned on all the cattle that he kept, but he had never kept any sheep: Held, that this was evidence of a right for all commonable cattle, which ought to have been left to the consideration of the jury. *Manifold v. Pennington and Others*, E. 6 G. 4. 161

8. An attorney, town clerk, and

clerk of the peace for the borough of L., in the county of L., upon the dissolution of a partnership which had existed between him and two other persons, entered into an agreement to pay to one of them (C. D.) a certain sum of money, and to use his endeavours to procure for him one-fourth of the prosecutions arising in the town clerk's office. In an action by C. D. on this agreement, it appeared that the magistrates of the borough of L. commit some offenders to be tried at the borough sessions, others at the county sessions, and others at the county assizes: Held, that the agreement extended to all prosecutions "arising in the town clerk's office," wherever they might be tried, and that letters written before the agreement was signed could not be given in evidence to shew that the parties intended the agreement to be applicable to the prosecutions at the borough sessions only. *Hughes v. Statham*, E. 6 G. 4. Page 187

9. The pauper, who rented a farm in C., assigned it to P. upon trust, to cultivate it and pay the pauper's debts, &c. The lease expired in 1817; no settlement of accounts took place, but P., without the authority of the pauper, then hired a house in H. at the yearly rent of 18*l.*, to which the pauper and his family removed; and they resided there for more than two years. The pauper never paid any rent or taxes, but P. was rated and paid the rent and taxes: Held, that the pauper gained a settlement in H. by the occupation of the house.

The owner of the house died before the appeal was heard, and a witness proved a declaration made by him during the period when the pauper occupied the house, that he had let it to him,

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claration contained an averment that the bill was accepted by the drawee: Held, that this was unnecessary, and that the plaintiff need not prove it. *Tanner v. Bean*, T. 6 G. 4. Page 312

13. Where in an action by the indorsee against the maker of a promissory note, payable with interest on demand, the plaintiff having proved that he gave value for it, the defendant tendered evidence of declarations made by the payee when the note was in his possession, that he (the payee) gave no consideration for it to the maker: Held, that this evidence was inadmissible, as the plaintiff could not be identified with the payee, and the note could not be treated as over due at the time of the indorsement. *Barough v. White*, T. 6 G. 4. 325

14. Where an indictment charged the defendant with conspiring *falsely* to indict A. B. with intent to extort money, and the jury found them guilty of conspiring to indict with that intent, but not *falsely*: Held, that enough of the indictment was found to enable the court to give judgment. *The King v. Hollingberry and Others*, T. 6 G. 4. 329

15. The owner of a check drawn upon a banker for 50*l.*, having lost it by accident, it was tendered five days after the date, to a shop-keeper in payment of goods purchased to the value of 6*l.* 10*s.*, and he gave the purchaser the amount of the check, after deducting the value of the goods purchased. The shop-keeper the next day presented the check at the banker's, and received the amount: Held, that in an action brought by the person who lost the check against the shop-keeper to recover the value of the check, the jury were properly directed to find for the plaintiff, if they

thought the defendant had taken the check under circumstances which ought to have excited the suspicions of a prudent man: Held, secondly, that the shop-keeper having taken the check five days after it was due, it was sufficient for the plaintiff to shew that he once had a property in it, without shewing how he lost it. *Down v. Halling and Others*, T. 6 G. 4. Page 330

16. An order, made by the court for the relief of insolvent debtors, and delivered to the gaoler, in whose custody the prisoner was, is evidence of his discharge under statute 53 G. 3. c. 102. s. 10. *Neal v. Isaacs*, T. 6 G. 4. 335

17. Declaration for an escape stated that the plaintiff in *Easter* term, 5 G. 4. in the King's Bench recovered against one H. W. 79*l.* as by the record appeared; that in *Trinity* term in the 5th year aforesaid, such proceedings were had in the said court that it was considered that the plaintiff should have execution against the said H. W. for the damages aforesaid, according to the force, form, and effect of the said recovery, by default of the said H. W., as by the record of the said last mentioned proceedings still remaining in the said court appears; and thereupon, on, &c., in *Trinity* term, in the 5th year aforesaid, the said H. W. was committed to the custody of the marshal in execution for the damage aforesaid, and escaped. Plea, not guilty. At the trial the plaintiff proved the original judgment in the King's Bench, and that a committitur issued thereon, but he did not prove any judgment in *scire facias*. It was held that the allegation of the judgment in *scire facias* was immaterial, and need not be proved. *Bromfield v. Jones, Esq.*, T. 6 G. 4. 380

22. Case for an injury done to plaintiff's reversionary interest in land, by cutting and carrying away branches of trees growing there; second count in trover for the wood carried away. It appeared in evidence that the land was let by the plaintiff to the occupier under a written agreement: Held, that in order to support the first count, the plaintiff was bound to produce it.

The plaintiff proved that the defendant carried away some branches of the trees, but gave no evidence of the value: Held, that he was entitled to nominal damages on the count in trover. *Cotterill v. Hobby*, T. 6 G. 4.

Page 465

23. In an action on a promissory note against a party who had indorsed it for the accommodation of the maker, it appeared that the plaintiff, the indorsee, had signed an agreement to accept, from the maker of the note, 5s. in the pound in full of his demand, on having a collateral security for that sum from a third person. It further appeared that the agent of the maker had represented to the plaintiff, before he signed the agreement, that the defendant would continue liable for the residue of the debt secured by the note, and that the agreement would be void, unless all the creditors signed: Held, first, that the execution of this agreement had the effect of discharging the surety; secondly, that the representations being as to the legal effect of the agreement, were immaterial, and had not the effect of avoiding it, and that as the latter of them gave to the agreement a meaning different from that which appeared upon the face of it; parol evidence of that representation was not admissible, per

Bayley J. Lewis v. Jones, T. 6 G. 4. Page 506

24. A. paid a nominal rent to the king of 1000 acres of woodland, the wood being all reserved to the crown. During four months in the year, A. exercised the privilege of shooting over the land, and by his permission another person took the grass: Held, that the payment of the rent, the exercise of the privilege of shooting, and the taking of the grass was sufficient evidence to shew that A. was in the actual possession of the land, so as to entitle him to maintain trespass.

A public footway over crown land was extinguished by an inclosure act, but for twenty years after the inclosure took place the public continued to use the way: Held, by *Bayley J.*, that this user was not evidence of a dedication to the public, as it did not appear to have been with the knowledge of the crown. *Harper v. Charlesworth*, T. 6 G. 4. 574

25. A public right of navigation in a river or creek may be extinguished either by an act of parliament or writ of ad quod damnum and inquisition thereon, or under certain circumstances by commissioners of sewers, or by natural causes, such as the recess of the sea or an accumulation of mud, &c., and where a public road obstructing a channel (once navigable) has existed for so long a time that the state of the channel at the time when the road was made cannot be proved; in favor of the existing state of things it must be presumed that the right of navigation was extinguished in one of the modes before mentioned, and the road cannot be removed as a nuisance to that navigation.

Every creek or river into which the tide flows is not on that account

FRANCHISE.

stante veredicto. *Lambert v. Taylor and Another, Executors*, E. 6 G. 4. Page 138

FINE.

See FRANCHISE.

FORFEITURE.

See COVENANT, 5. EJECTMENT.

FRANCHISE.

By letters patent, reciting that the liberty of *H.* was an ancient liberty, and that the lords were bailiffs of the same, and had exercised returns and executions of writs and processes within the liberty, the king granted to *A. B.*, his heirs and assigns, that he should have within the liberty of *H.* the return and execution of all writs, processes, and precepts of his majesty, by the lord's proper bailiffs, officers, and ministers, so that no sheriff of the king, his heirs or successors, should enter into the liberty to execute anything, unless it touched his majesty or his crown, or in default of the lord's bailiffs and officers. The bailiffs of the liberty had regularly attended the quarter sessions, and made returns of the jurors resident within the liberty: Held, that the bailiff of the liberty was bound, in obedience to the precept of the sheriff, to summon the jury within the liberty to attend the quarter sessions.

The court of quarter sessions made an order that *A. B.*, the acting bailiff of the lordship of *H.*, be fined 10*l.* for refusing, contrary to the duty of his office and to ancient usage, to summon the jury from the lordship to attend at the quarter sessions, he, the said *A. B.*, having been duly required so to do by warrant from

FREIGHT.

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the sheriff: Held, that this order was good, although it did not appear that the bailiff was summoned to attend at the sessions, it being his duty to do so without summons. *The King v. Jaram*, M. 6 G. 4. Page 692

FRAUDS, STATUTE OF.

A tenant held under a demise from the 26th day of *March* for one year then next ensuing and fully to be complete and ended, and so on from year to year, for so long as the landlord and tenant should respectively please. The tenant, after having held more than one year, gave a parol notice to the landlord less than six months before the 25th day of *March*, that he would quit on that day, and the landlord accepted and assented to the notice: Held, on demurrer, in replevin, that the tenancy was not thereby determined; there not having been either a sufficient notice to quit, or a surrender in writing, or by operation of law, within the meaning of the statute of frauds. *Johnstone v. Hudlestone, Clerk, and Another*, M. 6 G. 4. 922

FREIGHT.

In an action on a policy of insurance on freight, it appeared that the ship in the course of her voyage, having been injured by a peril of the sea, was obliged to put into a port and land the whole of her cargo. Part of the cargo had been so wetted by sea water that it could not be re-shipped without danger of ignition, unless it went through a process which would have detained the vessel six weeks, and have been attended with expence equal to the freight. Under these circumstances the master

a guaranty given to one of them, if there be evidence that it was given for the benefit of all. *Garrett and Bodenham v. Handley*, M. 6 G.4. Page 664

HABEAS CORPUS.

1. Where a prisoner is brought up under a habeas corpus issued at common law, he may controvert the truth of the return by virtue of the 56 G. 3. c. 100. s. 4. *Ex parte Beeching and Others*, E. 6 G. 4. 136
2. A cause cannot be removed by habeas corpus cum causa from an inferior court, unless the defendant is actually or constructively in custody. *Palmer and Another v. Forsyth and Bell*, T. 6 G. 4. 401

HIGHWAY ACT.

A surveyor of highways is not authorised under the 13 G. 3. c. 78. s. 6 & 64. to remove a fence in front of a house for the purpose of widening the road, which, in that part, was not more than twenty-four feet in breadth, unless the fence be on the highway. *Lowen v. Kaye*, E. 6 G. 4. 3

HUNDRED, ACTION AGAINST.

1. By the eighth section of the black act, which gives a remedy to any party damaged by the felonious destruction of his premises by fire, it is enacted, "that no person shall be entitled to recover damages unless he give notice as therein mentioned, and within four days after such notice, given in his, her, or their examination upon oath, or the examination upon oath of his, her, or their servant or servants that had the care of his or their houses,

outhouses, &c. before a justice of peace, whether he or they do know the persons that committed such fact, or any of them:" Held, that where the premises consumed by fire were in the care of several servants, they ought all to have been examined.

The lessee of a farm having quitted the premises demised, in the middle of the hay harvest, the steward of the lessor, who resided at a distance of a mile and a quarter from the farm, employed and paid several persons to get in the hay, and the persons so employed had possession of the barn, and used the stables on the farm with their teams and horses. An under-steward, who lived at the distance of five miles from the farm, superintended the executive part of the work. Some of these premises having been wilfully destroyed by fire, the steward of the lessor gave in his examination upon oath before the justice: Held, that the persons who had possession of the barn, and used the stables, were the persons having the care of the premises within the meaning of the act, and that they ought to have been examined. *The Duke of Somerset v. The Inhabitants of the Hundred of Mere*, E. 6 G. 4. Page 167

2. Where the damages sustained by means of the unlawfully and maliciously setting fire to any house, barn, outhouse, mow or stack of corn, &c. is less than 30^l., the remedy by action given by the 9 G. 1. c. 22. s. 7. to the party grieved is taken away, and a summary remedy established for it by the 3 G. 3. c. 33., although the injury has not been done by a riotous and tumultuous assembly. *The King v. The Justices of Somerset*, M. 6 G. 4. 913

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public continued to use the way : Held, by *Bayley J.*, that this was not evidence of a dedication to the public, as it did not appear to have been with the knowledge of the crown. *Harper v. Charlesworth*, *T. 6 G. 4.* Page 574

4. By a private inclosure act, commissioners were directed to fix and settle the boundaries of a parish, in a certain manner therein specified, and to advertise in a provincial newspaper a description of the boundaries so fixed and settled. The boundaries so fixed and settled were also to be inserted in the award of the commissioners, and to be final, binding, and conclusive. The commissioners having fixed and settled the boundaries in the mode specified, duly advertised a description of them ; but the boundaries mentioned in the award varied from those which had been advertised. Held, that the commissioners had not pursued the authority given by that act, and that their award was not binding as to the boundaries of the parish. *Rex v. The Inhabitants of Washbrook*, *M. 6 G. 4.* 732

INDICTMENT.

See EVIDENCE, 25. 30.

1. The delivery of a newspaper to the officer at the stamp office is a sufficient publication to sustain an indictment for a libel in that paper. *The King v. Amphlit*, *E. 6 G. 4.* 35
2. Indictment against a county for not repairing a bridge in a public highway. Plea, that by a certain act of parliament for amending this road, certain trustees were directed to lay out the tolls thereby granted in repairing the roads, and were empowered to make and repair bridges ; that the bridge

in question was erected by the trustees under and by virtue of that act, and that the trustees were liable, and ought to repair. Replication, that the trustees were not liable to repair : Held, that the bridge being built for public purposes in a public highway, the common law liability to repair attached upon the inhabitants of the county as soon as it was built, and that the plea was clearly insufficient to exonerate them, as it did not aver that the trustees had funds adequate to the repair of the bridge.

Semble, That if that fact had been averred and proved, still the county would have been primarily liable, and must have taken their remedy against the trustees. *The King v. The Inhabitants of Oxfordshire*, *E. 6 G. 4.* Page 194

3. Where an indictment charged the defendants with conspiring falsely to indict *A. B.* with intent to extort money, and the jury found them guilty of conspiring to indict with that intent, but not falsely : Held, that enough of the indictment was found to enable the court to give judgment. *The King v. Hollingberry and Others*, *T. 6 G. 4.* 329
4. Indictment for unlawfully, wilfully, &c., interrupting and obstructing, in the parish church of *A., W. C.*, clerk, in reading the order for the burial of the dead, and interring the corpse of *D.*, and for then and there unlawfully, by threats and menaces, preventing and hindering the burial of the said corpse according to the rites and ceremonies of the church of *England* : Held, in arrest of judgment, that the indictment was bad, first, because it did not appear that *C.* was a clerk in holy orders at the time of the interruption, or that he had a right to bury the corpse of *D.* in

water that it could not be re-shipped without danger of ignition, unless it went through a process which would have detained the vessel six weeks, and have been attended with expence equal to the freight. Under these circumstances the master sold these goods, and finding he could not obtain others, he sailed on his voyage, and arrived at his port of destination with the rest of his cargo. The master's proceedings were such as a prudent man, uninsured, would have adopted: Held, that the underwriters were not liable for the loss of the freight of these goods. *Mordy v. Jones*, T. 6 G. 4. Page 394

2. Assumpsit on a policy of insurance on freight of a ship at and from *Grenada* to *London*. It was proved that there is only one custom-house for the whole island of *Grenada*, that the vessel arrived in safety at *Grenada*, and discharged parts of her outward cargo at three different bays, and she was proceeding to a fourth to discharge the residue of her outward cargo, and take in part of her homeward cargo, when she was lost by perils of the sea: Held, that the vessel at the time of the loss was proceeding to this fourth bay for a purpose connected with the voyage insured, and, consequently, that it was no deviation, and the underwriter was liable. *Warre v. Miller*, (in error) T. 6 G. 4. 538

3. Where in assumpsit on a policy of insurance on goods warranted free from average, unless the ship were stranded, it appeared that in the course of the voyage the ship was, by tempestuous weather, forced to take shelter in a harbour, and in entering it struck upon an anchor, and being brought to her moorings was found leaky and in danger of sinking, and on

that account was hauled with warps higher up the harbour, where she took the ground, and remained fast there for half an hour: Held, that this was a stranding within the meaning of the policy. *Barrow v. Bell*, M. 6 G. 4. Page 736

JUDGMENT.

See ASSUMPSIT, 8.

Declaration in assumpsit containing several counts. Plea, non assumpsit infra sex annos. Replication as to the first ten counts, that before and at the time of making of the said *several* promises defendant was in parts beyond the seas, and afterwards returned to this kingdom, which was the first return after his making the said *several* promises, and within six years next after such return the plaintiff sued out a bill of *Middlesex*, returnable on *Friday* next after eight days of *Saint Hilary*, to answer the plaintiff of a plea of trespass, to which the sheriff returned non est inventus. The replication then stated various writs continuing the process, but did not describe them as alias and pluries writs, and the last had an ac etiam clause. The replication then stated that the first-mentioned precept was sued out by the plaintiff with intent to implead and declare against the defendant for the several causes of action in the declaration mentioned, and accordingly the plaintiff did exhibit his bill. There was a special demurrer, and one of the causes assigned was, that it did not appear that the plaintiff had not returned to this kingdom after the making of the said promises and undertakings in the first eight counts, and more than six years before the suing out of the first mentioned precept. Semble,

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it did sufficiently appear that the defendant's return was the first after each of the promises mentioned in the first ten counts. But held, at all events, that the want of the words "*each and every of them*" was not assigned with sufficient distinctness as a cause of demurrer. Held, also, that the *ac etiam* writ was a good continuance of common process, and that the continuances need not be by alias and pluries writs.

Another plea stated that the plaintiff had impleaded the defendant in a plea of trespass on the case upon promises in a court of judicature in the island of *Saint Christopher*, for the same causes of action as those mentioned in the declaration, that the defendant pleaded non assumpsit, upon which issue was joined, and the jury found for the defendants, with one penny costs, that judgment was given for the defendant upon that verdict, and that that judgment was afterwards affirmed, first, by a court of error in the island, and afterwards by the king in council: Held, that this plea was bad, inasmuch as it did not appear that the judgment at *Saint Christopher* was final and conclusive in the colony itself, so as to bar the plaintiff from another action there. *Plummer v. Woodburne*, T. 6 G. 4. Page 625

JUDGMENT ROLLS, DOCKETING OF.

See PRACTICE, 11.

JURAT.

See PRACTICE, 9.

JURISDICTION.

1. Where a suit for brawling in the church is instituted before the commissary of the bishop of the

diocese, it may be letters of request, i of arches.

- Semble, That bra made an offence by t c. 4. but was previous by the spiritual cou Williams, T. 6 G. 4.
2. By 47 G. 3. c. 68. s. acted, "that if as coals shall knowingl of coals for a sort really are not, he st every such offence dron for every chal By section 146. all exceeding 20l. are to before a justice of, that as the amount o under the thirty-thir pended upon the nun drons sold, an acti than one penalty fo selling twenty-five coals for coals which were not, was proper this court. *Reeve, Poole*, E. 6 G. 4.
 3. Where notice of ap an order for diverting was given, and the o filed with the clerk c for enrolment, but who made it, befor quarter sessions, gav lant notice that they the order: Held, that at sessions had no pov to the appellant the c paring to try the appe that the right of ap such an order depen 55 G. 3. c. 68. s. 3., s 13 G. 3. c. 78. s. 80. v. *Wing*, E. 6 G. 4.

JURY.

See FRANCHIS

JUSTICES.

In an action for false in against a justice of

The notice was signed *T. and W. A. Williams*. The names of the attornies for the plaintiffs were *Thomas Addam Williams* and *William Addam Williams*: Held, that the notice was sufficient. *James v. Swift*, *M. 6 G. 4.*

Page 681

LANDLORD AND TENANT.

1. Where a tenant, by permission of the landlord, remained in possession of part of a farm after the expiration of the tenancy: Held, that the landlord might distrain on that part within six months after the expiration of the tenancy, the 8 *Ann. c. 14. ss. 6 & 7.* not being confined to a tortious holding over or to the holding of the whole farm. *Nuttall v. Staunton*, *E. 6 G. 4.* 51
2. In ejectment for premises which had been demised on lease to one person who had underlet to others, it was held to be necessary to serve all the undertenants with a copy of the declaration. Where the tenant of a house locked it up and quitted it, and the landlord, three months afterwards, fixed a copy of a declaration in ejectment to the door: Held, that the service was not sufficient, but that the landlord should have treated it as a vacant possession. *Doe dem. Lord Darlington v. Cock and Others*, *E. 6 G. 4.* 259
3. Where a lease contained covenants to keep the premises in repair, and to repair within three months after notice, and a clause of re-entry for breach of any covenant, and the premises being out of repair, the landlord gave a notice to repair within three months: Held, that this was a waiver of the forfeiture incurred by breach of the covenant to keep the premises in repair, and that the landlord could not bring

ejectment until after the expiration of the three months. *Doe on the demise of Morecraft v. Meux*, *T. 6 G. 4.* Page 606

4. A tenant held under a demise from the 26th day of *March* for one year then next ensuing, and fully to be complete and ended, and so from year to year, for so long as the landlord and tenant should respectively please. The tenant, after having held more than one year, gave a parol notice to the landlord, less than six months before the 25th day of *March*, that he would quit on that day, and the landlord accepted and assented to the notice: Held, on demurrer in replevin, that the tenancy was not thereby determined, there not having been either a sufficient notice to quit, or a surrender in writing, or by operation of law, within the meaning of the statute of frauds.

Held, secondly, the tenant having holden over after the expiration of the time mentioned in the notice to quit, that the landlord was not entitled to distrain for double rent under the statute 11 *G. 2. c. 19. s. 18.*, inasmuch as that statute applied to those cases only where the tenant had the power of determining his tenancy by a notice, and where he actually gave a valid notice sufficient to determine it. *Johnstone v. Hudlestone and Another*, *M. 6 G. 4.*

922

LEASE.

See COVENANT, 1, 2, 4, 5. LANDLORD AND TENANT, 3, 4.

1. A lease purported on the face of it to have been made on the 25th *March* 1783, habendum to the lessee from the 25th of *March* now last past for thirty-five years. There was evidence to shew that the lease was not executed until after the 25th *March* 1783: Held, that

that it took effect from the time of delivery, and not from the day of the date, and consequently that the term commenced on the 25th March 1788, and not on the 25th March preceding the date of the deed. *Steele v. Mart*, T. 6 G. 4. Page 272

2. *A.* being seised in fee of an estate, by lease and re-lease executed upon his marriage, settled the same upon himself for life, remainder to his first and other sons in tail, with a power to the tenant for life to grant leases for years, determinable on three lives. *A.* afterwards granted a lease of part of the estate in question for the lives of three persons therein named, and the life of the survivor; and there was a covenant that the lessee should quietly hold and enjoy the premises for and during the said term, without interruption of the lessor, his heirs or assigns, or any other person claiming any estate, right, or interest by, from, or under him or any of his ancestors. The lease being for three lives, absolutely was not conformable to the power, and became void on the death of *A.*, and his eldest son brought an ejectment and evicted the lessee, two of the cestuy que vies being then living: Held, that the eldest son was a person claiming under the lessor within the meaning of the covenant for quiet enjoyment. Held, secondly, that by the words during the said term in that covenant the parties intended a term to continue so long as any of the cestuy que vies survived, and not a term to continue only for the life of the grantor. *Evans v. Vaughan*, T. 6 G. 4. 261

LIBEL.

1. The delivery of a newspaper to the officer at the stamp office is

a sufficient publication of an indictment for a newspaper. *The King v. ...* 6 G. 4.

2. In an action for a libel purported to be a retraction of the defendant's plea, the supposed libel was a true account and a fair trial: Held, upon a demurrer, this plea was bad. although it be lawful in the discharge of a public duty to utter matter injurious to individuals, yet the publication of such slanderous matter is not justifiable, unless it be proved that it was published in good faith, and for the purpose of giving the public information which it was fit for them to receive, was warranted by the law. *Flint, Gent.*, one, &c. 6 G. 4.

LIMITATIONS, STATUTES.

1. In assumpsit against a defendant who had made a declaration stated that he had made his promissory note thereby promised to pay the demand 200l., and did not note to him, whereby he came liable to pay, and at the time he was indebted to *J.* the amount of the sum secured by the note and interest. It was held, that afterwards, at the death of *J. Y.*, the money paid in the note being wholly due and unpaid, on, &c., at, &c., by one of the coroners for the county of *N.*, it was found, upon the body of *J. Y.*, then lying dead, by the coroner and lawful men of the said *J. Y.* feloniously and murder himself, inquisition before the coroner, and the finding of record more

peared, by reason of which said inquisition, and by force of the felony, the said *J. Y.* forfeited to the king the promissory note and the money due thereon. The declaration then set forth a grant under the king's sign manual to the plaintiff of the note and money due thereon, as mentioned in a certain other inquisition, and that his majesty delivered the note to the plaintiff, of which the defendants, after the death of the testator, had notice. Breach, non-payment by testator or the defendants since his death. Plea, first, non-assumpsit testator; secondly, that the note became due and payable to *J. Y.* in his lifetime, and that the causes of action did not accrue to him within six years before the exhibiting of the bill, upon which plea issue was taken and joined; thirdly, nul tiel record of the inquisition taken before the coroner, upon which issue was taken; fourthly, that there was no such grant as alleged in the declaration. The issue on the plea of the statute of limitations having been found for the defendants, and all the other issues for the plaintiff.

Held, on motion by the plaintiff for judgment non obstante veredicto, that the plea of the statute of limitations, that the causes of action, did not accrue to *J. Y.* within six years, was bad, inasmuch as it did not shew that *J. Y.* was barred by the statute at the time of his death; and if he was not, then the king, not being expressly mentioned in the statute, was not within the statute, and his rights were not barred.

Held, also, that the averment, that the note became due to *J. Y.* in his lifetime, being an acknowledgment that he, at one time, had a good cause of action, (which had passed to the crown

by forfeiture, and from the crown to the plaintiff); a cause of action was thereby confessed by the plea, and the matter pleaded in avoidance being insufficient, the plaintiff was entitled to judgment non obstante veredicto. *Lambert v. Taylor and Another, Executors*, *E. 6 G. 4.* Page 138

2. Declaration in assumpsit containing several counts. Plea, non-assumpsit infra sex annos. Replication that before and at the time of making of the said several promises, defendant was in parts beyond the seas, and afterwards returned to this kingdom, which was the first return after his making the said several promises, and within six years next after such return the plaintiff sued out a bill of *Middlesex*, returnable on *Friday* next after eight days of *Saint Hilary*, to answer the plaintiff of a plea of trespass, to which the sheriff returned non est inventus. The replication then stated various writs continuing the process, but did not describe them as alias and pluries writs, and the last had an ac etiam clause. The replication then stated that the first-mentioned precept was sued out by the plaintiff with intent to implead and declare against the defendant for the several causes of action in the declaration mentioned, and accordingly the plaintiff did not exhibit his bill. There was a special demurrer, and one of the causes assigned was, that it did not appear that the plaintiff had returned to this kingdom after the making of the said promises and undertakings, in the first eight and more than six years before the suing out of the first mentioned precept. Semble, that it did sufficiently appear that the defendant's return was the first after each of the promises mentioned in the counts. But

held, at all events, that the want of the words "*each and every of them*" was not assigned with sufficient distinctness as a cause of demurrer. Held also, that the *ac etiam* writ was a good continuance of common process, and that the continuances need not be by alias and pluries writs. *Plummer v. Woodburne*, T. 6 G. 4.

Page 625

3. Copyhold lands were granted to A. for the lives of herself and B., and in reversion to C. for other lives. A. died, having devised to B., who entered, and kept possession for more than 20 years. On his death C. brought ejectment: Held, that the action was barred by the statute of limitations, for that C's right of possession accrued on the death of A., inasmuch as there cannot be a general occupant of copyhold land. *Doe on the Demises of Foster and Others v. Scott*, M. 6 G. 4.

706

4. The sum recovered by verdict is to be considered the debt for which the action is brought, within the London court of requests act 39 & 40 G. 3. c. 10. s. 12., and therefore where the entire debt (which exceeded 5*l.*) was contracted more than six years before the commencement of the action, and the plaintiff in answer to a plea of the statute of limitations, proved a promise within six years as to 3*l.* only, it was held that the plaintiff was not entitled to costs. *Shaddick, Administratrix of Shaddick v. Bennet*, M. 6 G. 4.

769

MANDAMUS.

1. In an action for a false return to a writ of mandamus, it was alleged to be a custom in a parish, that whenever a certain perpetual cu-

racy should be vacated of the death of the curate, the parishioners a fit person to succeed that a vacancy having plaintiff was duly elected parishioners, according to custom. At the trial that at a meeting of the duly convened for the such an election, it was before the election parishioners who had church rates should not to vote. In consequence resolution several persons the legal right of voting tender their votes, and of others who did not votes were rejected, on that they had not paid rate: Held, that a petition by a majority of the parish votes were received at the meeting, was not duly elected parishioners, according to custom. At the election parishioner tendering a card, containing only the name of the candidate for whom

seemeth, that this motion was illegal. *Faulkner*, T. 6 G. 4.

2. Where a defendant is *quo warranto*, the plaintiff is entitled to the writ of *habeas corpus* for a new election, if he can show a reasonable time. If he cannot show the defendant is entitled to the writ. *The King v. M.* 6 G. 4.
3. Upon an appeal against a removal, the justices were equally divided upon a question of fact, the settlement of the parish was pending. The sessions held that it lay on the parish to establish their satisfaction of a majority of the parish court, quashed the removal. The sessions held

cided the case, this court refused a mandamus.

Quæry, if the sessions ought to have adjourned instead of quashing the order. *The King v. The Justices of Mommouthshire*, 6 G.4.

Page 844

4. The court will not grant a mandamus to compel the benchers of one of the inns of court to admit an individual as a member of the society, with a view to his qualifying himself to be called to the bar. *The King v. The Benchers of Lincoln's Inn*, M. 6 G.4. 855
5. A mandamus will lie to the justices and clerk of the peace of a county or borough, to permit an individual on behalf of several persons who contribute to the county rate, to inspect and take copies of the last two rates made by the justices, and all orders made for the expenditure of the same, and the several orders of sessions made thereon, and other proceedings and documents relating thereto.

But an application for such inspection must be previously made to the justices assembled at quarter sessions. *The King v. The Justices of Leicester*, M. 6 G.4. 891

6. Where a party applies for a mandamus to compel churchwardens to allow him to inspect their accounts, according to the directions of the 17 G. 2. c. 38. he must state some special reasons for which he wishes to see the accounts.

It is no answer to the application, that the statute imposes a penalty upon a churchwarden improperly refusing the inspection. *The King v. Clear and Another*, M. 6 G.4. 899

MALICE.

See SLANDER, 1.

MALICIOUS ARREST.

See ARREST, 1.

MILITARY OFFICER.

- A. being a commissioned officer on full pay in a regiment, was appointed civil superintendant of a colony, and at the same time was appointed to the command of such of his majesty's subjects as then were armed or might thereafter arm for the defence of the settlers in the colony: Held, that the appointment to command all persons armed in defence of the settlers in the colony, vested in him the right to command the military forces there.

After he had acted as military commander there for some years, the regiment in which he held a commission was disbanded, and he was put upon half pay. Both before and after the disbanding of the regiment, he acted as military commander and civil superintendant of the colony, and he was recognized as filling both characters by the authorities at home: Held, that although by the disbanding of the regiment he lost his commission and rank in the regiment, the right to command the king's troops at the colony continued, and, therefore, that he was justified in putting under arrest, for disobedience of orders, a commissioned officer on full pay, holding equal regimental rank with himself. *Bradley v. Arthur*, T. 6 G.4. Page 292

MONEY HAD AND RECEIVED.

See ASSUMPSIT.

NEW TRIAL.

See PRACTICE, 8.

NON

NON PROS.

See PRACTICE, 2. 13.

NOTICE OF ACTION.

See BUILDING ACT.

OATH.

See PRACTICE, 19.

OVERSEER.

See APPEAL, 1.

The 59 G. S. c. 12. s. 17. vests in the churchwardens and overseers of the poor, in the nature of a body corporate, all buildings, lands, and hereditaments belonging to the parish : Held, that in order to constitute the body corporate intended by the act, there must be two overseers, and a churchwarden or churchwardens, and that where there were two overseers appointed, one of whom was afterwards appointed (by custom) sole churchwarden, the act did not vest parish property in them. *Woodcock v. Gibson and Others*, T. 6 G. 4. Page 462

PARTNER.

1. An action may be maintained by the several partners of a firm, upon a guarantee given to one of them, if there be evidence that it was given for the benefit of all.
Garrett and Bodenham, surviving Partners v. Handley, M. 6 G. 4.
664
2. *A.* a merchant in *London*, by letter directed *B.* a broker in *Liverpool*, to purchase 1000 bales of cotton, and stated that *B.* was to be allowed to be one-third interested therein, acting in the business free of commission. *B.* agreed to purchase the cotton and

to hold one-third i
charging no commi
chased the cotton,
sequent correspon
continued for up
months, the trans
ferred to as a joint
concern, joint purc
culation, joint cot
B. transmitted polic
against loss by fire
that the cotton wa
rooms rented by hi
he held the key t
security: Held, th
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ton, and consequ
pledge of the whole
out any fraud or co
part of the pawnee
to the pawnee to h
as against A. *Reid*
Hollinshead and
6 G. 4.

PARTY WA

See BUILDING

PAYMENT

1. The paymaster of a n had given credit in a officer in that cor 1st of January 1817 of November 1820, fi creased pay, erroneo to be granted by a g of the 27th of August officer of his situation ment of that account v to the officer in 18 cember 1816, the payi informed by the bo nance, that the inc granted by the orde would not be allowed in the situation of tl question. The pay not communicate this to the officer until 18 sequent to that time tinued to receive his

in an action brought by his personal representative to recover such pay, it was not competent to the paymasters to retain any such sums of money on account of the sums which they had credited him for by way of increased pay, and which they had allowed him to consider his own for so long a period of time. *Skyring, Administratrix, v. Greenwood and Cox*, T. 6 G. 4. Page 281

2. *A.* being agent for the grantor and the grantee of an annuity delivered an account to the grantee, by which it appeared that he, the agent, had received certain payments on account of the annuity; these payments in fact had not been received: Held, that the agent was bound by the account which he had delivered unless he could shew that he had given credit for those payments by mistake.

If a party who owes money to another on two different accounts, makes a payment generally, the party receiving it may apply it to either. It is not necessary, however, that the person paying the money should declare the appropriation of it at the time of payment: it is sufficient if it can be collected from other circumstances that he intended at the time of payment to appropriate it to one account specifically.

And, therefore, where *A.* having large demands against *B.* upon bill transactions with himself, and also as agent for several persons to whom *B.* had granted annuities secured by *C.*, caused an attorney to make application to *B.* and *C.* on behalf of these annuitants, and *B.* in consequence of that application and the remonstrances of *C.*, the surety, paid to *A.* certain sums of money, without making any specific appropriation of them at the time of payment: Held,

that *A.* must be considered as having received them on account of the annuitants, and that the latter were entitled to have those monies divided amongst them, in proportion to the amount of their respective demands. *Shaw and Another, Assignees of Howard and Gibbs, v. Picton*, M. 6 G. 4.

Page 715

PENAL ACTION.

See PLEADING, 9.

PLEADING.

1. Where goods were placed in the hands of a factor for sale, and he indorsed the bills of lading to the defendants, who thereupon accepted a bill for him, and he at the same time directed the defendants to sell the goods and reimburse themselves the amount of the bill out of the proceeds: Held, that the defendants having sold the goods, could not be sued for them in trover by the original owner.

Semble, that he might have maintained money had and received for the proceeds, and that the defendants could not have retained the amount of the money advanced to the factor. *Stiernel v. Holden and Another*, E. 6 G. 4.

5

2. *A.* being seised of an ancient mill, together with a stream of water diverted out of a river, and flowing from thence unto her mill, and *B.* being possessed of other mills, together with a stream of water diverted out of the same river, above the stream of *A.* by means of a head wear, and flowing from thence through the lands of *A.* down to *B.*'s mills as appurtenant to the same: *B.* erected upon other lands below the lands of *A.*, and near the said watercourse, two other mills, whereby it becoming

coming necessary for him (*B.*) to have a larger supply of water, he widened and deepened his watercourse in the soil of *A.*, and raised and heightened the head wear, and thereby diverted the greatest part of the water into the watercourse for the use of his mills, so that the water was prevented from flowing down to the mill of *A.* so copiously as it had formerly done, and thereby *A.*'s mill became of no use. *A.* having recovered damages in one action against *B.* on this account, and having afterwards brought a second action for subsequent damages, in order to prevent all further disputes *B.* agreed to take a grant from *A.* of the use and benefit of the watercourse so widened and deepened, and of the liberty of diverting the water out of the river. By lease reciting these facts *A.*, in consideration of 1500*l.* paid by *B.*, demised to *B.* the use of the watercourse so widened and deepened as aforesaid, and the free liberty of diverting so much of the water of the river into and along the watercourse as should be necessary for the use of *B.*'s mills, habendum for ninety-nine years, if three persons therein named should so long live, at an annual rent. Soon after the execution of this deed *A.*'s mill was destroyed. *B.* or those claiming under him continued to enjoy the watercourse and the use of the water during the term, and paid the rent. The lease having determined by the death of the last surviving cestuy que vie, the person claiming under the grantee continued to enjoy the watercourse in the manner described in the grant, and paid rent for it. The reversion in the land upon which *A.*'s mill formerly stood having vested in *C.* it was held that the latter might maintain in-

debitatus assumpsit and occupation of the water run against the persons under *B.* *Davis v. 6 G. 4.*

3. *A.* arrested *B.* on debt for money paid but did not declare do so; and soon after continued the action costs: Held, that the action was not maintainable prima facie malice and the absence of probable cause to support the action was sufficient for a malicious arrest. *Coghill, E. 6 G. 4.*

4. A plaintiff is bound to show that the debt tendered in satisfaction of the debt and to sign an affidavit to discharge the plaintiff out of custody. An affidavit on the case will lie against a plaintiff for having malice so to do; and the refusal to sign the discharge is sufficient evidence of malice in the absence of circumstances to rebut the presumption. *Croft v. Moore, E. 6 G. 4.*

5. The delivery of a warrant by an officer at the station without sufficient publication of the indictment for a libel is not sufficient. *The King v. Amphlett, 6 G. 4.*

6. Debt on bond. Plea, that the making of the bond was carried on the wine trade, and was induced by the sons to sell it; that she advanced the proceeds of the other money she had, to 1000*l.*, to her son to carry them out in business, upon afterwards, it was held that each of the sons was liable to her a bond with a surety for the payment of 40*l.* per annum. *Th*

in question was given in pursuance of that agreement, and for the consideration therein mentioned, and no memorial of it enrolled, wherefore the bond was void. Replication, that the bond was not given in pursuance of the agreement and for the consideration mentioned in the plea. The jury found that it was so given in the terms of the plea: Held, that the plea did not shew the annuity to have been granted for a pecuniary consideration, so as to bring it within the 17 G. 3. c. 26., and the plaintiff had judgment.

There were other pleas upon which issues were taken, and the jury not having found any verdict as to them, the Court awarded a venire de novo. *Hick v. Keats (in error)*, E. 6 G. 4. Page 69

7. Where the plaintiff in assumpsit alleged that in consideration that he would buy a quantity of sheathing copper of the defendant at a certain price, defendant undertook that it should be good, sound, substantial, and serviceable copper: Held, that this warranty was not proved by shewing a purchase of copper sheathing at the ordinary market price, no express warranty having been given.

Quære, Whether such evidence would have been sufficient to prove an allegation, that the defendants promised that the article sold should be reasonably fit for sheathing copper. *Gray and Another v. Cox and Others*, E. 6 G. 4. 108

8. In assumpsit against executors, declaration stated that testator made his promissory note, and thereby promised to pay J. Y. on demand 200*l.*, and delivered the note to him, whereby testator became liable to pay, but did not pay, and at the time of his death was indebted to J. Y. for the amount of the sum secured by the note, and interest. It then

averred, that afterwards, and after the death of J. Y., the money specified in the note being and remaining wholly due and unsatisfied, to wit, on, &c., at, &c., before A. B., one of the coroners for the county of N., it was found, upon view of the body of J. Y., then and there lying dead, by the oaths of honest and lawful men, of, &c., that the said J. Y. feloniously did kill and murder himself, as by the inquisition before the coroner remaining of record more fully appeared, by reason of which said inquisition, and by force of the felony, the said J. Y. forfeited to the king the promissory note and the money due thereon. The declaration then set forth a grant under the king's sign manual to the plaintiff of the note and money due thereon, as mentioned in a certain other inquisition, and that his majesty delivered the note to the plaintiff, of which the defendants, after the death of the testator, had notice. Breach, non-payment by testator or the defendants since his death. Plea, first, non-assumpsit testator. Secondly, that the note became due and payable to J. Y. in his lifetime, and that the causes of action did not accrue to him within six years before the exhibiting of the bill; upon which plea issue was taken and joined. Thirdly, null tiel record of the inquisition taken before the coroner; upon which issue was taken. Fourthly, that there was no such grant as alleged in the declaration. The issue on the plea of the statute of limitations having been found for the defendants, and all other issues for the plaintiff, it was held, on motion, to enter a nonsuit:

First, that it was not necessary for the plaintiff to produce at the trial the inquisition mentioned in the king's warrant, inasmuch as that

that was an office of instruction only, and not of entitling; the title of the crown having accrued by the felony under the coroner's inquisition.

Secondly, that the grant under the sign manual was sufficient to pass the property in the note.

Held, thirdly, on motion in arrest of judgment, that inasmuch as the declaration alleged that the testator was, at the time of his death, indebted to *J. Y.*, the payee of the note, in the principal and interest due thereon, it sufficiently appeared that the note was a security for a debt, and that the debt and security having passed to the crown by operation of law, were assignable by the crown without indorsement.

Held, fourthly, assuming it to be necessary, in order to vest the chattels of a *felo de se* in the crown, that the coroner's inquest should be found by twelve men, that it must be taken after verdict that the inquest was so found.

Held, sixthly, on motion by the plaintiff for judgment non obstante veredicto, that the plea of the statute of limitations, that the causes of action did not accrue to *J. Y.* within six years, was bad, inasmuch as it did not shew that *J. Y.* was barred by the statute at the time of his death; and if he was not, then the king, not being expressly mentioned in the statute, was not within the statute, and his rights were not barred.

Held, seventhly, that the averment, that the note became due to *J. Y.* in his life-time being an acknowledgment that he, at one time, had a good cause of action (which had passed to the crown by forfeiture, and from the crown to the plaintiff,) a cause of action was thereby confessed by the plea, and the matter pleaded in avoidance being insufficient, the plain-

tiff was entitled to obstande veredicto. *Taylor and Another v. E. 6 G. 4.*

9. By 47 G. 3. c. 68. s. 3. "that if any vendor knowingly sell one so a sort which they r he shall forfeit for offence 20*l.* per chald chaldron so sold." B all penalties not exce to be sued for before peace: Held, that a of the penalty und section depended up ber of chaldrons sol for more than one knowingly selling 25 coals for coals which were not, was propi in this court. *Reed v. Pool, E. 6 G. 4.*

10. Where one of five common brought co lease for rent payable most usual days of the year, and the bre on the 24th day of J large sum of money, sum of 21*l.* 15*s.*, one the rent for three q year of the term th became due from th to the plaintiff, and arrear: Held good u demurrer. *Henniker v. E. 6 G. 4.*

11. Plaintiff claimed a ri mon for all his comm le. The proof was t turned on all the cat kept, but he had nev sheep: Held, that th dence of a right for a able cattle, which oug been left to the consi the jury. *Manifold v. and Others, E. 6 G. 4.*

12. *A.* being indebted t him an order upon *C.* tenant, to pay the amc

the next rent that would become due. *B.* sent the order to *C.*, but had not any direct communication with him upon the subject. At the next rent day, *C.* produced the order to *A.*, and promised to pay the amount to *B.*, and upon receiving the difference between that and the whole rent, *A.* gave a receipt for the whole: Held, that *B.* could not recover the amount of the order from *C.* in an action for money had and received, or upon an account stated. *Wharton v. Walker*, *E. 6 G. 4.*

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13. An attorney, town clerk, and clerk of the peace for the borough of *L.*, in the county of *L.*, upon the dissolution of a partnership which had existed between him and two other persons, entered into an agreement to pay to one of them (*C. D.*) a certain sum of money, and to use his endeavours to procure for him one-fourth of the prosecutions arising in the town clerk's office. In an action by *C. D.* on this agreement, it appeared that the magistrates of the borough of *L.* commit some offenders to be tried at the borough sessions, others at the county sessions, and others at the county assizes: Held, that the agreement extended to all prosecutions "arising in the town clerk's office," wherever they might be tried, and that letters written before the agreement was signed, could not be given in evidence to shew that the parties intended the agreement to be applicable to the prosecutions at the borough sessions only: Held, also, that the defendant, as clerk of the peace of the borough, could not legally enter into such an agreement as that set out in the declaration.

Quære, Whether it would have been legal had he been town

clerk only, and not clerk of the peace. *Hughes, Gent., one &c. v. Statham, Gent. one, &c.*, *E. 6 G. 4.*

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14. Indictment against a county for not repairing a bridge in a public highway. Plea, that by a certain act of parliament for amending this road, certain trustees were directed to lay out the tolls thereby granted in repairing the roads, and were empowered to make and repair bridges; that the bridge in question was erected by the trustees under and by virtue of that act, and that the trustees were liable and ought to repair. Replication that the trustees were not liable to repair: Held, that the bridge being built for public purposes in a public highway, the common law liability to repair attached upon the inhabitants of the county as soon as it was built, and that the plea was clearly insufficient to exonerate them, as it did not aver that the trustees had funds adequate to the repair of the bridge.

Semble, that if that fact had been averred and proved, still the county would have been primarily liable, and must have taken their remedy against the trustees. *The King v. The Inhabitants of Oxfordshire*, *E. 6 G. 4.*

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15. By a turnpike act, certain tolls were imposed upon every carriage, &c., drawn by horses, and it was enacted that no action should be commenced against any person for any thing done in pursuance of the act, until twenty-one days' notice should be given to the clerk of the trustees, or after sufficient satisfaction or tender thereof had been made to the party aggrieved, or after six calendar months next after the fact committed, and that every such action should be brought in the county or place where the matter should

should arise, and not elsewhere, and the defendant should and might, at his election, plead specially, or the general issue, not guilty, and give in evidence that the same was done in pursuance and by the authority of the act: Held, in assumpsit against a toll collector brought to recover back money alleged to have been exacted by him improperly as toll, that twenty-one days' notice of action ought to have been given, and that the action should have been brought in the proper county. *Waterhouse and Others v. Keen*, E. 6 G. 4. Page 200

16. *A.*, resident at *Naples*, sent an order to *M. and Co.*, hardwaremen at *Birmingham*, "to dispatch to him certain goods on insurance being effected. Terms, three months' credit from the time of arrival." *M. and Co.* (having marked the package with *A.*'s initials,) dispatched the goods by the canal to *Liverpool*, and effected an insurance, declaring the interest to be in *A.* At *Liverpool* the goods were delivered by the agent of *M. and Co.* to the owner of a vessel bound to *Naples*, through whose negligence they were damaged: Held, that the property in the goods vested in *A.* as soon as they were dispatched from *Birmingham*, and that the terms of the order did not make the arrival of the goods at *Naples* a condition precedent to *A.*'s liability to pay for them, and that he might, therefore, maintain an action for the injury done to the goods through the negligence of the ship owner. *Fragano v. Long*, E. 6 G. 4. 219

17. Case against three defendants, proprietors of a stage coach. The declaration stated that the defendants so carelessly managed their coach and horses, that the

coach ran against and broke his leg. In evidence that one *C.* was driving at the accident happened found that it happened his negligent driving the plaintiff might against all the parties though he might been entitled to against the one defendant coach. *Moreton v. two others*, E. 6 G. 4.

18. In assumpsit by on a promissory note made in 1814, and by testator, and for money it appeared on the face of the note that it penny receipt stamped pound agreement stamped was indorsed on it a penalty of 5*l.*, and a proper stamp for such 1814 was a three shilling stamp. Held, that as it appeared on the face of the note, been issued without having to it a stamp equal in value to that required by law, the defendants had no power been issued, to affix stamp, and, therefore, not receivable in evidence in support of the promissory note, or of the counts. The defence applied to by the plaintiff of interest, should bring her some following *Sunday*: He though this was an admission something was due, should not appear what the debt was, or that it the plaintiff as executor of her own right, or that for which assumpsit the plaintiff was not recover even nominal

and a nonsuit was entered. *Green, Executrix of D. Boaz v. Davies*, E. 6 G. 4. Page 235

19. The paymaster of a military corps had given credit in account to an officer in that corps, from the 1st of *January* 1817 to the 5th of *November* 1820, for certain increased pay erroneously supposed to be granted by a general order of the 27th of *August* 1806 to an officer of his situation, and a statement of that account was delivered to the officer in 1821. In *December* 1816 the paymasters were informed by the board of ordnance that the increased pay granted by the order of 1806 would not be allowed to persons in the situation of the officer in question. The paymaster did not communicate this information to the officer until 1821, and subsequent to that time they continued to receive his pay: Held, in an action brought by his personal representative to recover such pay, it was not competent to the paymaster to retain any such sums of money on account of the sums which they had credited him for by way of increased pay, and which they had allowed him to consider his own for so long a period of time. *Skyring, Administratrix, v. Greenwood and Cox*, T. 6 G. 4. 281

20. Where in an action by an indorsee against the indorser of a bill of exchange dishonoured on presentment for payment, the declaration contained an averment that the bill was accepted by the drawee: Held, that this was unnecessary, and that the plaintiff need not prove it. *Tanner v. Bean*, T. 6 G. 4. 312

21. A., who held an office for life in the gift of B., agreed with C. to resign, and to procure the appointment for him, and C. in consideration thereof agreed that A.

should have a moiety of the profits. A. resigned, and through his influence C. was appointed, and executed a deed for the performance of the agreement. The agreement was not communicated to B. In covenant by A. against C. for not paying over to him a moiety of the profits of the office: Held, that the agreement was a fraud upon B., and, therefore, illegal and void. *Waldo v. Martin*, T. 6 G. 4. Page 319

22. Where a declaration in assumpsit alleged, that in consideration that plaintiff would retain and employ defendants to lay out a sum of money in the purchase of an annuity, they undertook to do their duty in the premises; that plaintiff did retain and employ them, but defendants did not do their duty, but on the contrary took an insufficient security for the payment of the annuity, whereby plaintiff lost the money: Held, on motion in arrest of judgment, that the count was bad, inasmuch as it did not state that any reward was to be paid to the defendants, or that they were employed in any particular character, so as to make them responsible for taking a bad security, although not guilty of negligence or dishonesty.

Other counts alleged that the defendants at the time when they lent the money, knew that the security was insufficient, but did not allege that the plaintiff had sustained any damage.

Semble, that on that ground those counts were also bad. *Dartnall v. Howard and Another*, T. 6 G. 4. 345

23. Quo warranto for usurping the office of bailiff of the borough of *Stockbridge*, being an office "of great trust and pre-eminence within the borough, touching the rule and government of the borough, and the election and return

of burgesses to serve for the commons in parliament for the said borough." The defendant's pleas shewed that he had been elected to the office, and traversed "that the office of bailiff was an office touching the rule and government of the borough." There were general replications taking issue upon all the facts stated as inducements to the defendant's traverse, (but they did not notice the traverse,) and special replications setting up various customs as to the election of bailiffs of the borough. Demurrer and joinder: Held, that the defendant not having traversed that the office "was one of great trust and pre-eminence within the borough, touching the election and return of burgesses to serve in parliament," had admitted it to be so, and that for such an office a quo warranto would lie; and, secondly, that the general replications being clearly good, and the demurrer being to all the replications, judgment must be given for the crown.

Quære, whether the special replications were good. *The King v. M'Kay*, T. 6 G. 4. Page 351

24. An attorney of the superior courts cannot maintain an action for his bill for business done in the insolvent court, in procuring the discharge of an insolvent, without first delivering a bill as required by the 2 G 2. c. 23. s. 23.

Smith v. Wattleworth, T. 6 G. 4. 364

25. Information in the nature of a quo warranto for usurping the office of mayor of *Monmouth*. Plea, that defendant was duly elected according to the governing charter of the borough. Replication that there were two candidates; that fifty good votes tendered for the losing candidate were improperly rejected; and that thirty-eight persons who had been unduly elected and admitted

as burgesses were voters for the defendant a majority of the leges declared was in favor of the candidate. On demurrer that the replication traversed that it was only an indirect and not a direct denial of the defendant's plea, and also for that it put in issue the title of the corporation de facto, not be done in an action against the elected. *v. Hughes*, T. 6 G. 4.

26. Declaration for an assumpsit that the plaintiff in *5 G. 4.* in *King's Bench* against one *H. W.* 79 record appeared, the term in the fifth year of such proceedings were said court that it was that the plaintiff should recover against the said the damages aforesaid to the force, form, and value of the said recovery, by the said *H. W.* as by the said last mentioned proceedings still remain said court appears, and on, &c., in *Trinity* 15th year aforesaid, the said *W.* was committed to the custody of the marshal in execution of the damage aforesaid, and the said *W.* Plea, not guilty. At the trial the plaintiff proved the original in *King's Bench*, committitur issued that he did not prove any assumpsit facias. It was held that the allegation of the judgment facias was immaterial, and not be proved. *B. Jones, Esq.*, T. 6 G. 4.

27. Where a bill of exchange is dishonored by the acceptor, and notice of the dishonor is given to the different parties, the indorsee having

actions by original against the acceptor, and a prior indorser afterwards took from the acceptor a warrant of attorney for the debt and costs payable by instalments. (The last of the instalments being payable before the time when in the ordinary course of proceedings he could have obtained judgment against the acceptor): Held, in the action against the indorser, that the taking the warrant of attorney from the acceptor being a matter arising after the commencement of the action, it was no bar to the action generally, and, therefore, that it was not receivable in evidence under the general issue.

Quære, whether the taking of the warrant of attorney from the acceptor was, under the circumstances, a giving of time so as to discharge the other parties to the bill. *Lee v. Levy*, T. 6 G. 4.

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28. Where a declaration against the marshal for an escape alleged that one S. S. was arrested and gave bail, that afterwards bail above was put in before a judge at chambers, "as appears by the record of the recognizance," that S. S. surrendered in discharge of the bail, and afterwards escaped: Held, that the plaintiff was bound to prove that bail above was put in as alleged, and that the averment was not made out by the production of the filazer's book, the entry therein importing that the recognizance was taken before a single judge, an examined copy of the entry of the recognizance of bail, stating that the recognizance was taken before the court at *Westminster*, having also been given in evidence. *Bevan v. Jones, Esq.*, T. 6 G. 4.

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29. A judgment obtained in one of the superior courts in *Ireland*,

since the union, is not a record in *England*, and assumpsit is maintainable upon such a judgment. *Harris v. Saunders*, T. 6 G. 4.

Page 411

30. An insolvent may sue upon a contract of sale made by him subsequently to the hearing of his petition by the court for relief of insolvent debtors, and while he was detained in prison by their order. The effect of the discharge is to relieve the insolvent only to the extent of the specific debts described in the schedule. *Taylor v. Buchanan*, T. 6 G. 4.

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31. Information for usurping the office of burgess of the borough of *M.* Plea 1st, That *M.* is an ancient borough, and the burgesses a corporation by prescription, consisting of an indefinite number. That from time immemorial a court has from time to time been holden (amongst other things) for the election of burgesses, and notice of holding the court has been immemorially given by ringing a certain bell within the town and borough. And that the burgesses, or so many of them as choose, have a right to attend that court; and being present and attending there, have elected and have a right to elect at their discretion such persons to be burgesses as they think fit. That before the information, to wit, on, &c., notice of holding the court was given by ringing the bell, that the court was holden, and the defendant elected a burgess. Plea 2d set out a charter of *Ed. 6.*, and that from the time of the charter the mode of electing burgesses hath been for the mayor, bailiffs, and burgesses, being met and assembled for that purpose, at a certain court holden in and for the town and borough before the mayor and bailiffs, (notice having been given

3 X 2

given of holding the said court by the ringing of a certain bell within the town and borough) have elected burgesses at their discretion. That the mayor, bailiffs, and burgesses being in due manner met and assembled at the said court, holden before the mayor, &c. for the election of burgesses, (notice having been given of holding the court by ringing the bell) elected defendant a burgess. Plea 3d recited the charter, and averred that it contained no directions as to the election of burgesses; that the mayor, bailiffs, and burgesses, on, &c., met and assembled at a court holden before the mayor and bailiffs for the election of burgesses, (notice having been given of holding the court by ringing a bell) elected the defendant a burgess. Plea 4th, that the mayor, bailiffs, and burgesses being met and assembled for that purpose at a meeting of the corporation at the Guildhall, have from time immemorial elected burgesses; and that notice of holding such meeting during all the time aforesaid hath been given, and ought to have been given, by ringing a certain bell within the said town and borough. Pleas 5th and 6th varied from the 2d and 3d only by substituting "met and assembled for that purpose at the Guildhall," for "at a certain court holden, &c." 7th plea set out a custom to hold a court before the mayor and bailiffs every *Monday*, and that the burgesses for the time being "being met and assembled for that purpose" at the said court, have elected burgesses. That on, &c. the said court was holden for the election of burgesses, and that the burgesses "then and there so met and assembled together as aforesaid," elected the defendant. Plea 8th set out a nonexistent

by-law providing for of burgesses in the s as by the custom set 1st plea: Held, that were bad. The first because the notice by of the bell of holdin or meetings in those tioned as there descri a reasonable notice, an fore insufficient; and cause it did not sta *Monday's* court was al for the purpose of el notice of the intend was not stated as a custom, which was th reasonable. 2ndly, t defendant did not, ir election, bring himsel custom.

Replication to the that the burgesses n sembled at the said the 7th plea mentione in due manner met an for the election of General demurrer at semble, that this repl good. *The King v. 6 G. 4.*

32. Declaration in assu that the defendant w horse to be sound, the that the defendant wa horse to be sound ev except a kick on the that this was a qualifi a general warranty, an was a variance betwee ranty proved and tha the declaration. *Jones T. 6 G. 4.*

33. In an action for a fals a writ of mandamus, it to be a custom in a p whenever a certain per racy should be vacant of the death of the curat wise, the parishioners s a fit person to succeed that a vacancy having

plaintiff was duly elected by the parishioners, according to the custom. At a trial it appeared that at a meeting of the parishioners duly convened for the purpose of such an election, it was decided before the election began, that parishioners who had not paid church rates should not be allowed to vote. In consequence of this resolution, several persons who had the legal right of voting did not tender their votes, and the votes of others who did tender their votes, were rejected on the ground that they had not paid the church rate: Held, that a party elected by a majority of the persons whose votes were received at this meeting, was not duly elected by the parishioners according to the custom.

At the election, every parishioner tendering a vote gave a card, containing only the name of the candidate for whom he voted; semble, that this mode of election was illegal. *Faulkner v. Elger and Another*, T. 6 G. 4. Page 449

34. Case for an injury done to the plaintiff's reversionary interest in land, by cutting and carrying away branches of trees growing there. 2d count, in trover for the wood carried away. It appeared in evidence, that the land was let by the plaintiff to the occupier, under a written agreement: Held, that in order to support the first count, the plaintiff was bound to produce it.

The plaintiff proved that the defendant carried away some branches of the trees, but gave no evidence of the value: Held, that he was entitled to nominal damages on the count in trover. *Cotterill v. Hobby*, T. 6 G. 4. 465

35. In an action for a libel, which purported to be a report of a trial, the defendant pleaded that the supposed libel was in substance a

true account and report of the trial: Held, upon demurrer, that this plea was bad.

Semble, that although it be lawful for a counsel in the discharge of his duty to utter matter injurious to individuals, yet the subsequent publication of such slanderous matter is not justifiable, unless it be shewn that it was published for the purpose of giving the public information, which it was fit and proper for them to receive, and that it was warranted by the evidence. *Flint Gent. one, &c. v. Pike, &c.* T. 6 G. 4. Page 473

36. Where in assumpsit plaintiff declared that he had bargained and agreed with one J. E. for the purchase of certain freehold houses at a certain price, and defendant in consideration that plaintiff would sell and give up to him (defendant) the said bargain, and suffer him to become the purchaser of the houses, promised to pay 40*l.* and averred that plaintiff did give up the bargain to defendant, and suffered him to become the purchaser, and that defendant did accordingly become the purchaser and take the said bargain, and obtain a conveyance from J. E. on the terms aforesaid, but that defendant had not paid the 40*l.*: Held, after verdict for the plaintiff, that it must then be presumed that the bargain between plaintiff and J. E. was in writing, and that the giving up of that contract to defendant, was a sufficient consideration for his promise. *Price v. Seaman (in error)*, T. 6 G. 4. 525

37. Covenant for non-payment of rent, stating that plaintiff and his wife, since deceased, demised certain premises to defendant for years, reddendum to plaintiff and his wife 2*l.* per annum, and a covenant to pay the rent to the plaintiff

3 X 3

plaintiff and his wife. Averment, that on, &c. the wife died, and that afterwards, to wit, on, &c. 24th of the rent aforesaid became due and in arrear to plaintiff. By the lease set out on oyer, it appeared that the reddendum was to the husband and wife, and *the heirs of the wife*, and the covenant to pay rent was in the same form. Plea, that the premises were the estate of the wife, and that the plaintiff had nothing in them but in right of his wife; that on, &c. she died without issue, leaving *J. A.* her heir, whereupon all the estate of the plaintiff ceased, and *J. A.* threatened to enter and eject defendant unless he attorned, whereby he was compelled to attorn and become tenant to *J. A.* General demurrer and joinder: Held, that the plea was good, for that some interest having passed by the lease from plaintiff and his wife, it could not work by estoppel, and the defendant was therefore entitled to shew that the plaintiff's interest had ceased; and also that the attornment upon the threat of eviction, was tantamount to an entry by the heir.

Semble, that upon the face of the declaration and the deed set out on oyer (which was thereby made part of the declaration) the plaintiff had no right of action; for the covenant was to pay rent to the plaintiff and his wife and her heirs, and the plaintiff shewed the death of his wife, whereupon the rent was payable to her heir. *Hill v. Saunders (in error)*, T. 6 G. 4. Page 529

38. Assumpsit for goods sold and delivered. Plea, that the goods were sold and delivered to defendant by *A.*, the factor and agent of plaintiff, with the privity of plaintiff, as and for the goods of *A.*; and that defendant did not know that the goods were not the

property of *A.*; that of the sale and delivery and still is indebted in more than the value of the goods, and that defendant is willing to set off to plaintiff the value of the monies owing from *A.*: Held, demurrer, that the plea was bad. *Carr v. Hinckliff*, T.

39. In a declaration in which it was averred that the right of perpetual curacy was "in all the households of families in a town of the heirs male of *A. M.* such other of his kind as should have any land in the township, or the greater part of them," and it was shewed that the chapel being vacant was duly nominated minister by the parish, the greater number of the holders and heads of the township, to whom nomination and election minister then belonged: verdict, that the declaration was bad, inasmuch as it did not shew that the heirs male of the body; and such other of the blood as had lands in the township concurred in the nomination; or that they were in the township; or that there were no other persons. *Farnworth and The Bishop of Chester* T. 6 G. 4.

40. *A.* paid a nominal rent for 1000 acres of the wood being all reserved to the crown. During four years *A.* exercised the privilege of shooting over the land, without permission of the crown. Another party claimed the grass: Held, that the declaration was bad, for that of the rent, the exercise of the privilege of shooting, and the use of the grass was su-

dence to shew that *A.* was in the actual possession of the land, so as to entitle him to maintain trespass. *A.* occupied under a parol licence from the crown, and the rent paid by him was much less than one-third of the annual value of the land: Held, that as *A.* had no legal conveyance from the crown by matter of record, and as the rent reserved was not one-third of the annual value of the land, as required by the 1st *Anne*, *et. l. c. 7. s. 5.* he had no legal right to retain possession of the land as *against the crown*, but that as he occupied with the permission of the crown, his possession was sufficient to enable him to maintain trespass against wrong doers.

Semble, that a person who occupies crown land under a parol licence, is not an intruder. *Harper v. Charlesworth*, *T. 6 G. 4.*

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41. A constable arresting a man on suspicion of felony must take him before a justice to be examined as soon as he reasonably can, therefore a plea justifying a detention for three days, in order that the party whose goods had been stolen might have an opportunity of collecting his witnesses and bringing them to prove the felony, was held bad on demurrer. Semble, that a constable cannot justify handcuffing a prisoner unless he has attempted to escape, or unless it be *necessary* in order to prevent his doing so. *Wright v. Court and Others*, *T. 6 G. 4.*

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42. Where a lease contained covenants to keep the premises in repair, and to repair within three months after notice, and a clause of re-entry for breach of any covenant, and the premises being out of repair, the landlord gave a notice to repair within three

months: Held, that this was a waiver of the forfeiture incurred by breach of the general covenant to keep the premises in repair, and that the landlord could not bring ejectment until after the expiration of the three months. *Doe on the demise of Morecraft v. Meux and Others*, *T. 6 G. 4.*

Page 606

43. Declaration in assumpsit containing several counts. Plea, non assumpsit *infra sex annos*. Replication, that before and at the time of making of the said *several* promises defendant was in parts beyond the seas, and afterwards returned to this kingdom, which was the first return after his making the said *several* promises, and within six years next after such return the plaintiff sued out a bill of *Middlesex*, returnable on *Friday* next after eight days of *Saint Hilary*, to answer the plaintiff of a plea of trespass, to which the sheriff returned non est inventus. The replication stated various writs continuing the process, but did not describe them as alias and pluries writs, and the last had an *ac etiam* clause. The replication then stated that the first-mentioned precept was sued out by the plaintiff with intent to implead and declare against the defendant for the several causes of action in the declaration mentioned, and accordingly the plaintiff did exhibit his bill. There was a special demurrer; and one of the causes assigned was, that it did not appear that the plaintiff had returned to this kingdom after the making of the said promises and undertakings. Semble, that it did sufficiently appear that the defendant's return was after each of the promises mentioned in the counts. But held, at all events, that the want of the words *each and every of them* was not assigned

assigned with sufficient distinctness as a cause of demurrer.

Held also, that the *ac etiam* writ was a good continuance of common process, and that the continuances need not be by alias and pluries writs.

Another plea stated, that the plaintiff had impleaded the defendant in a plea of trespass on the case upon promises in a court of judicature in the island of *Saint Christopher's* for the same causes of action as those mentioned in the declaration; that the defendant pleaded non assumpsit, upon which issue was joined, and the jury found for the defendant, with one penny costs; that judgment was given for the defendant upon that verdict, and that that judgment was afterwards affirmed; first, by a court of error in the island, and afterwards by the king in council: Held, that this plea was bad, inasmuch as it did not appear that the judgment at *Saint Christopher's* was final and conclusive in the colony itself, so as to bar the plaintiff from another action there. *Plummer v. Woodburne*, T. 6 G. 4. Page 625

44. The goods of *A.* were seized under a *fi. fa.*, and the judgment creditor took a bill of sale from the sheriff, and afterwards sold the goods to *B.*, who put a man into possession, but the goods remained in *A.*'s house, and were used by him as before the execution. The circumstance of the execution was, however, notorious in the neighbourhood. Another judgment creditor issued a *fi. fa.* against *A.*, under which the sheriff seized the goods. In trespass against him by *B.*: Held, that the jury were properly directed to give a verdict for the plaintiff or the defendant, as they should be of opinion that the purchase by *B.* was *bonâ fide* or

otherwise; for that if were *bonâ fide* bought for with his money, it was not rendered void by continuing to enjoy the property. *Latimer v.* 6 G. 4.

45. Case for slander. It stated that plaintiff was and treasurer of certain that defendant spoke concerning plaintiff, as such and collector, certainly "thereby meaning that plaintiff, as such treasurer, had been guilty of, & that the plaintiff was the inuendo to prove the treasurer and collector *v. Till*, M. 6 G. 4.

46. Where, in case against for removing goods seized *a fi. fa.* without satisfying lord for the rent due to declaration alleged that issued out of K. B., and produced in evidence as have issued out of C. It was a fatal *Sheldon v. Whitaker* and M. 6 G. 4.

47. Trespass for driving against the plaintiff's servant, whereby plaintiff privied of his services, and to expence in obtaining. The child was two years old, and the plaintiff misplaced him in an hospital would not have occasion expence, but preferred to be at home: Held, that the service was the gist of trespass and that the child being of performing any service of his tender age, it was not maintainable, as no expence had been necessarily incurred.

Query, Whether it might have maintained action for the expences

had been necessarily incurred?
Hall v. Hollander, M. 6 G. 4.

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48. An action may be maintained by the several partners of a firm upon a guaranty given to one of them, if there be evidence that it was given for the benefit of all. *Garrett and Bodenham v. Handley*, M. 6 G. 4. 664

49. In an action for false imprisonment against a justice of the peace. The notice required by the 24 G. 2. c. 44. was signed T. and W. A. Williams. The names of the attornies for the plaintiffs were *Thomas Adams Williams* and *William Adams Williams*: Held, that the notice was sufficient. *James v. Swift*, M. 6 G. 4. 681

50. Trespass against three for assault and battery. Plea, not guilty, by all; by the third, a justification in defence of his freehold. Replication, that he used more force than was necessary. Rejoinder, that all the defendants did not use more force than was necessary. Demurrer and joinder: Held, that the replication was good, and the rejoinder bad. *Morrow v. Belcher and two Others*, M. 6 G. 4. 704

51. Where, in covenant, a defendant craves oyer of the deed, sets it out, and pleads non est factum, the deed so set out becomes a part of the declaration, and the only question at the trial upon the issue is, whether the deed set out was executed by the defendant.

Covenant to deliver timber (growing on the premises) sufficient for the repairs thereof; averment, that there was timber growing on the premises sufficient for the repairs, but defendant had not delivered it. Plea, that there was not timber growing on the premises sufficient and proper for the repairs. Issue thereon. Semble, that the covenant meant

that the timber should be sufficient in quality as well as quantity, and that the plea was good, (not having been demurred to,) without stating that there was not timber sufficient for any part of the repairs. *Snell v. Snell and Another*, M. 6 G. 4. Page 741

52. Indictment for unlawfully, willfully, &c. interrupting and obstructing, in the parish church of A., W. C., clerk, in reading the order for the burial of the dead and interring the corpse of D., and for then and there unlawfully, and by threats and menaces, preventing and hindering the burial of the said corpse according to the rites and ceremonies of the church of England: Held, in arrest of judgment, that the indictment was bad; first, because it did not appear that C. was a clerk in holy orders at the time of the interruption, or that he had a right to bury the corpse of D. in the church of A.; secondly, because the threats and menaces used should have been specified in the indictment. *The King v. Cheere*, M. 6 G. 4. 902

53. Declaration by the assignees of a bankrupt for goods sold by the bankrupt, alleging promises made to him before his bankruptcy; also on an account stated with the plaintiffs, as assignees. Plea, a former action brought by the bankrupt upon the same promises before his bankruptcy, and still pending: Held, on demurrer, that the plea was bad; first, because the former action could not be brought upon the account stated with the plaintiff as assignees; secondly, because the assignees were not competent to continue the former suit if they wished it. *Biggs and Others, Assignees, v. Cox*, M. 6 G. 4. 920

54. A tenant held under a demise from the 26th day of March for one

one year then next ensuing, and fully to be complete and ended, and so from year to year, for so long as the landlord and tenant should respectively please. The tenant, after having held more than one year, gave a parol notice to the landlord, less than six months before the 25th day of March, that he would quit on that day, and the landlord accepted and assented to the notice: Held, on demurrer in replevin, that the tenancy was not thereby determined, there not having been either a sufficient notice to quit, or a surrender in writing or by operation of law, within the meaning of the statute of frauds.

Held, secondly, the tenant having holden over after the expiration of the time mentioned in the notice to quit, that the landlord was not entitled to distrain for double rent under the stat. 11 G. 2. c. 19. s. 18., inasmuch as that statute applied to cases only where the tenant had the power of determining his tenancy by a notice, and where he actually gave a valid notice sufficient to determine it. *Johnstone v. Hudleston, Clerk, M. 6 G. 4.* Page 922

55. An act of parliament for incorporating a gas light company enacted, that all the costs of obtaining that act should be paid and discharged out of the monies subscribed in preference to all other payments: Held, that the attorneys who obtained the act might maintain an action of debt founded upon the statute for their costs.

The declaration contained other counts, stating that the defendants were indebted to the plaintiff for work and labor, &c.: Held, upon general demurrer, that even assuming that a corporation could not contract but by deed, the omission to set out a deed was a mere matter of form, and there-

fore ground of special only. *Tilson and Pres &c., v. The Town of W Light Company, M. 6*

PLEDGE,

See PARTNERSHIP.

POOR RATE.

1. The proprietors of certain stone quarries agreed to a canal company quantities of good limestone the canal company should at the rate of 7d. per ton they should at any time to deliver the quantities it should be lawful to them to enter into or upon the limestone quarries of a proprietors, and to quantities of limestone should think proper, per ton. The proprietors limestone quarries having supply the limestone required company entered, and for more than twenty work the quarries, and limestone at 2d. per ton however, that the company not any exclusive occupation, mere privilege, and condition that they were not liable rated to the poor. *The Trent and Mersey Navigation Company, E. 6 G. 4.*
2. By a canal act, the proprietors of the Oxford canal were entitled to take a certain sum per mile upon all goods. By a subsequent act for making a new canal reciting that it was apparent that the making of the canal would be injurious to the proprietors of the Oxford canal and that it had been agreed that an indemnification should be made to them, as a compensation

such injury, it was enacted, "That, Instead of the mileage duty payable to the proprietors of the *Oxford* canal, it should be lawful for them to take, for all coals which should pass from the *Oxford* canal into and upon the said intended canal, so much per ton, without any regard to the distance the same should pass along the *Oxford* canal; and for all other goods which should pass from any other navigable canal into and upon the *Oxford* canal, and from thence into and upon the said intended canal, or from the intended canal into and upon the *Oxford* canal, and from thence into and upon any other navigable canal, a certain other sum per ton, without regard to the distance the same should pass from the said *Oxford* canal: Held, first, that the proprietors of the *Oxford* canal were rateable to the poor in respect of their mileage duty in every parish through which the canal passed.

Secondly, that they were liable also to be rated in every parish along which the canal passed for a proportion of the compensation duty. *The King v. The Oxford Canal Company*, E. 6 G. 4. Page 74

3. Where an inclosure act enacted that the tithes of a certain parish should be extinguished, and that in lieu of them the commissioners should award to the rector a certain annual rent, equal in value to a certain portion of the lands in the parish, to be paid by the owners of those lands in such proportions as the commissioners should award: Held, that the rector was liable to be rated to the poor in respect of this rent or annual payment, the act not having expressly exempted it from that burthen. *The King v. Boldero*, Clerk, T. 6 G. 4. 467

4. The burgesses of *Nottingham*,

and the occupiers of ancient messuages there, had, as such, for a certain portion of the year, a right to turn cattle into certain fields, and to exclude during that period the owner of the soil: Held, that this was a mere right of common, and not rateable to the relief of the poor. *The King v. Churchill and Booth*, M. 6 G. 4. Page 750

5. Several partners of a firm carried on a branch of their business in the parish of *A*. by means of a foreman and other servants who resided in the parish, in a house part of the premises where the business was carried on, but no one of the partners resided in that parish: Held, that they were not rateable to the relief of the poor in that parish in respect of their stock in trade there. *Ras v. North Curry*, M. 6 G. 4. 953

PRACTICE.

1. It is not necessary that there should be fifteen days between the teste and return of a writ of error. *Laidler v. Foster*, E. 6 G. 4. 116
2. Defendant, by mistake, pleaded the general issue to three instead of four counts. Plaintiff replied; defendant then amended his plea by extending it to the fourth count. Plaintiff not having replied to the amended plea, although ruled so to do, defendant signed judgment of non-pros to the whole action: Held, that this was irregular. *Dorsey v. Cooke*, E. 6 G. 4. 195
3. Where a prisoner is brought up under a habeas corpus issued at common law, he may controvert the truth of the return by virtue of the 56 G. 3. c. 100. s. 4. *Ex parte Beeching and Others*, E. 6 G. 4. 196
4. Where a statute gives treble damages, the plaintiff is entitled to three

- three times the full amount of the damages found by the jury. *Buckle v. Bewes*, E. 6 G. 4. Page 154
5. A motion for a new trial cannot be made after a motion in arrest of judgment. *Philpot v. Page*, E. 6 G. 4. 160
6. In ejectment for premises which had been demised on lease to one person who had underlet to others, it was held to be necessary to serve all the under-tenants with a copy of the declaration. Where the tenant of a house locked it up and quitted it, and the landlord three months afterwards fixed a copy of a declaration in ejectment to the door: Held, that the service was not sufficient, but that the landlord should have treated it as a vacant possession. *Doe, d. Lord Darlington v. Cock and Others*, E. 6 G. 4. 259
7. A rule for costs for not proceeding to trial may be obtained after a rule for judgment, as in case of a nonsuit has been discharged. *Thomas v. Williams*, E. 6 G. 4. 260
8. Where several persons are convicted of a misdemeanor, a new trial cannot be moved for unless they are all present in court; and it is not a sufficient excuse for absence that they are in custody on civil process. *The King v. Hollingberry and Others*, T. 6 G. 4. 329
9. By the jurat to an affidavit of debt made by a foreigner, it was certified by the signer of the bills of *Middlesex* that the affidavit was interpreted by J. C., professor of languages, (he having first sworn that he understood the *English* and *French* languages,) to the deponent, who was afterwards sworn to the truth thereof: this was held to be sufficient. *Bosc v. Solliers*, T. 6 G. 4. 358
10. After a Judge's order making it imperative for a defendant to plead within a given time, and no plea within that time, the plaintiff sign judgment without rule to plead. *Nias v. T.* 6 G. 4.
11. The Court will not order a new trial roll to be taken of although it was not carried twenty four years after judgment, that having been docketed. *Barrow, admr. v. Croft. Marsden v.* 6 G. 4.
12. A cause cannot be removed by habeas corpus cum causa from an inferior court unless the defendant is actually or constructively in custody. Where a certiorari issued to move a cause from an inferior court, and the court returned a copy of the record, not the record itself, and quashed the writ and re-awarded a procedendo. *and Another v. Forsyth*, T. 6 G. 4.
13. Where a defendant is removed from an inferior court by certiorari, the plaintiff is not to follow the suit, and the defendant cannot sign judgment non-pros for want of a declaration. *Clerk v. The Mayor, &c.* M. 6 G. 4.
14. Where a defendant is removed by quo warranto, the prosecutor is entitled to the writ of mandamus for a new election, if he can show a reasonable time. If he cannot, the defendant is entitled to the writ. *The King v. M.* 6 G. 4.
15. Where a motion is made to remove a cause from an inferior court to K. B. of error, the affidavits of error are entitled in the cause in error, not in the original cause. *v. Rogier*, M. 6 G. 4.
16. Where a court of request enables a defendant to discontinue a plaintiff of his costs if he does not appear in the superior court, the defendant

make his application for that purpose promptly, and where a motion to enter a suggestion to deprive the plaintiff of costs might have been made in *Easter* term, but instead of that a negotiation respecting the costs was then entered into, and the motion was made in *Trinity* term, Held that it was too late. *Hippesley v. Layng*, M. 6 G. 4. Page 863

17. If bail do not justify in four days after exception, the plaintiff is at liberty to proceed upon the bail bond, although from the bail having been put in sooner than was necessary, the rule for bringing in the body has not expired, and the sheriff is not liable to an attachment. *Bond v. Evans*, M. 6 G. 4. 864

18. A Judge's order for a stay of proceedings must be drawn up forthwith. Delay in drawing it up operates as a waiver of it. *Charge and Others v. Farhall*, M. 6 G. 4. 865

19. An affidavit to hold to bail made before a *British* consul in a foreign country, stated that the defendant was indebted to the plaintiff in a certain number of pounds sterling: Held, that the affidavit was insufficient, inasmuch as it did not appear with certainty, whether the defendant was indebted in *British* or in *Irish* sterling money.

Quære, If a *British* consul in a foreign country has authority to administer an oath. *Pickardo v. Machado*, M. 6 G. 4. 886

20. Where a defendant in replevin avows as landlord for rent in arrear, and obtains a verdict, he is entitled to double costs, although the action be really and bona fide brought to try the title to the land.

The true mode of estimating the amount of double costs is, first to allow the defendant the single costs, including the expences of

witnesses, counsel's fees, &c., and then to allow him one-half of the amount of the single costs, without making any deduction on account of counsels' or court fees, &c. *Staniland v. Ludlam*, M. 6 G. 4. Page 889

21. When in ejectment a person obtains a rule to defend as landlord, the plaintiff, nevertheless, may sign judgment against the casual ejector, but may not take out execution without further order: Held, that after verdict and judgment against the landlord, execution may be issued against him without any further order of the Court. *Doe, dem. Lucy v. Bennett*, M. 6 G. 4. 897

22. Process being returnable on the 7th *November*, the time to put in bail expired on the 11th. On the 10th, defendant obtained a rule nisi to set aside process and stay proceedings, on the ground of misnomer. This rule was discharged with costs on the 21st. On the 22d, an assignment of the bail bond was taken, and proceedings had under it, and on the same day the defendant put in bail: Held, that the defendant had not the whole of the 22d to put in bail, and that the assignment of the bail bond, and the proceedings had under it, were regular. *St. Hanlaire v. Byam*, M. 6 G. 4. 970

PRINCIPAL AND AGENT.

1. Where goods were placed in the hands of a factor for sale, and he indorsed the bills of lading to the defendants, who thereupon accepted a bill for him, and he at the same time directed the defendants to sell the goods, and reimburse themselves the amount of the bill out of the proceeds: Held, that the defendants, having sold the goods, could not be sued for

for them in trover by the original owner.

Semble, That he might have maintained money had and received for the proceeds, and that the defendants could not have retained the amount of the money advanced to the factor. *Stiernelld v. Holden and Another*, E. 6 G. 4.

Page 5

2. By power of attorney the colonel of a regiment appointed *A. B.* his true and lawful agent, for him and in his name to ask, demand, and receive from the paymaster-general of the forces all such pay and allowances as might become due and payable unto him, the colonel, the commissioned officers, non-commissioned officers, and privates of the regiment. *A. B.* having received a sum of money from the paymaster-general under this authority, afterwards became bankrupt, the colonel being then indebted to him for clothing furnished to the regiment: Held, that *A. B.* must be taken to have received the money from the paymaster-general in his character of agent to the colonel, and that the latter was entitled to set off, in an action brought by the assignees for a sum due for clothing, the monies received from the paymaster-general by the agent before his bankruptcy. *Knowles and Others, Assignees of Gilpin, v. Sir A. Maitland, bart.*, E. 6 G. 4.

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3. *A.*, resident at *Naples*, sent an order to *M. and Co.* hardwaremen at *Birmingham*, "to dispatch to him certain goods, on insurance being effected. Terms, three months' credit from the time of arrival." *M. and Co.* (having marked the package with *A.*'s initials) dispatched the goods by the canal to *Liverpool*, and effected an insurance, declaring the interest to be in *A.* At *Liverpool*

the goods were delivered agent of *M. and Co.* of a vessel bound through whose negligence were damaged: Held property in the good *A.* as soon as they were from *Birmingham*, on terms of the order directed the arrival of the goods a condition preceded liability to pay for them he might therefore maintain action for the injury done to the goods through the negligence of the ship-owner. *Fragan*, E. 6 G. 4.

4. Assumpsit for goods so delivered. Plea, that the goods were sold and delivered to the defendant by *A.*, the factor and plaintiff, with the privity of the defendant, and that the defendant knew that the goods were the property of *A.*; that at the time of the sale and delivery the defendant was still indebted to the plaintiff in more than the value of the goods, and that the defendant was willing to set off against the plaintiff the value of the goods owing from *A.*: Held, that the plea was good. *Carr v. Hincliff*, T. 6 G. 4.
5. *A.*, being agent for the plaintiff and the grantee of an order, delivered an account to the plaintiff by which it appeared that the agent, had received certain payments on account of the goods, in fact, these payments, in fact, had been received: Held, that the agent was bound by the order, which he had delivered, and could shew that he had no credit for those payments. *Shaw and Another v. Howard and Gibbston*, M. 6 G. 4.

QUARE IMPEDIT.

POWER OF ATTORNEY,
See PRINCIPAL AND AGENT, 2.

PROMISSORY NOTE,
See BILL OF EXCHANGE, 3. STAMP, 1.

PUIS DARREIN CONTINU-
ANCE,
See COSTS, 1.

QUARE IMPEDIT.

In a declaration in quare impedit the right of presentation to a perpetual curacy was stated to be in all the householders and heads of families in a township and the heirs male of *A. M.*'s body, and such other of his kindred or blood as should have any lands in the township, or the greater number of them; and it was averred that the chapel being vacant, one *B.* was duly nominated and elected minister by the plaintiffs, being the greater number of the householders and heads of families in the township, to whom the nomination and election of the minister then belonged: Held, after verdict, that the declaration was bad, inasmuch as it did not state that the heirs male of *A. M.*'s body, and such other of his kindred or blood as had lands in the township, concurred in the nomination, or that they were in the minority, or that there were no such persons.

In 1631, *A. M.* founded a chapel of ease, and endowed it with lands for the maintenance of a minister, and by his will directed that his son should during his life have the nomination and election of the minister, and might by will or deed set down the order or course for the nomination and election of the minister after his death; and if he should not set down any course or order, then the minister

REMOVAL, ORDER OF. 1636

should be nominated and elected by all the householders and heads of families in the township, and the heirs male of his, *A. M.*'s body, and such other of his kindred or blood as should have any lands in the township, or the greater number of them. By the instrument of consecration all tithes, fees, and emoluments whatever on burials, marriages, &c. were reserved to the vicar of the parish. The son not having set down any order or course, held that the householders and heads of families in *Astley* had no right to present a curate to this chapel without the consent of the vicar.

It is a general rule of law that where a chapel of ease has been erected within the time of legal memory, the incumbent of the mother church is entitled to the nomination of the minister unless there has been a special agreement to the contrary, to which the parson, patron, and ordinary are parties. Per *Abbott C. J. Farnworth and Others v. The Bishop of Chester and Others*, T. 6 G. 4.

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QUO WARRANTO,

See CORPORATION, 1. MANDAMUS, 2.

REMOVAL, ORDER OF.

1. An order of removal was directed to the churchwardens and overseers of the parish of *L.* In fact *L.* was a vill, and there were no churchwardens in it: Held, that the word "*churchwardens*" might be rejected as surplusage, and that the sessions might, under the statute 5 G. 2. c. 19. s. 1., amend the order, by inserting in it the words, *or vill.*

A party by serving an office of clerk to a chapel situated in an extra-parochial vill, may gain a settlement in the adjoining parish
if

if he reside there, and if part of the duties of his office of clerk be exercisable within that part of the parish where he resides. *The King v. Amlwch*, M. 6 G. 4. Page 757

2. Upon an appeal against an order of removal, the justices were equally divided in opinion upon a question of fact, on which the settlement of the pauper depended. The sessions thinking that it lay on the respondent parish to establish their case to the satisfaction of a majority of the court, quashed the order of removal. The sessions having decided the case, this court refused a mandamus.

Quære, if the sessions ought to have adjourned, instead of quashing the order. *The King v. The Justices of Monmouthshire*, M. 6 G. 4. 846

RIGHT OF COMMON,

See EVIDENCE, 7. POOR RATE, 4.

RIVER.

A public right of navigation in a river or creek may be extinguished either by an act of parliament or writ of ad quod damnum, and inquisition thereon, or under certain circumstances by commissioners of sewers or by natural causes, such as the recess of the sea, or an accumulation of mud, &c.; and where a public road obstructing a channel (once navigable) has existed for so long a time that the state of the channel at the time when the road was made cannot be proved, in favour of the existing state of things, it must be presumed that the right of navigation was extinguished in one of the modes before mentioned, and the road cannot be removed as a nuisance to that navigation.

Every creek or river into which the tide flows is not on that ac-

SETTLEMENT

count necessarily a navigable channel, although sufficiently large for the purpose. *Per Bayley J. The King v. Tague and Others*, T. 1.

SEA SHORE

See DEED, 1.

SESSIONS, ORDER

See MANDAMUS

The court of quarter sessions made an order that *A. B.*, bailiff of the lordship fined 10*l.* for refusing to the duty of his office of ancient usage, to summon from the lordship to a quarter sessions, he then having been duly required by warrant from the court. Held, that this order although it did not require the bailiff to be summoned at the sessions, it being to do so without summons. *King v. Jaram*, M. 6 G.

SET OFF,

See ASSUMPSIT,

SETTLEMENT — by ship.

An apprentice, who lived with his master in the parish of *I.*, went home to his parish of *R.* every Sunday nights, (with his leave,) and returned to *Monday* morning. The apprentice having returned and usual on a *Monday*, left in the evening, and returned to *R.* being merely by indulgence, and not for the purpose of the apprentice.

not sufficient to confer a settlement. *The King v. Ilkeston, E. 6 G. 4.* Page 64

SETTLEMENT — by Hiring and Service.

1. A pauper was hired three weeks before *Martinmas* at 4*l.* wages, and received 1*s.* earnest, but no period was mentioned for duration of the service. The pauper went to the service a week after *Martinmas*, and upon the same day his master told him that it was not the custom to hire servants in that parish for more than fifty-one weeks, that he forgot to mention it at the time when he hired him, and therefore that, if he had no objection, he would hire him again for fifty-one weeks, and give him another shilling for earnest. The pauper accepted it, and remained in the service till the following *Martinmas*. There not having been a year's service, the sessions held that there had been a dissolution of the original contract, and not a dispensation with the week's service: Held, that this was a question of fact for the sessions, and they having determined it, this court refused to disturb their decision. *The King v. The Inhabitants of Bottesford, E. 6 G. 4.* 84
2. The forty days' residence necessary to confer a settlement by hiring and service must be within the compass of a year, but need not be under the same year's hiring. *The King v. The Inhabitants of Findon, E. 6 G. 4.* 91
3. An infant pauper may gain a settlement by hiring and service with his father. *The King v. The Inhabitants of Chillesford. The King v. The Inhabitants of Winslow, E. 6 G. 4.* 94

VOL. IV.

SETTLEMENT — by renting a tenement.

1. A pauper, three weeks after *May-day* 1820, hired a house and land in the parish of S. for a year from the preceding *May-day*, at the rent of 15*l.*, and at the expiration of that time hired it again for another year at the same rent. He occupied the premises from the time of the first hiring until six months after the second hiring, and paid the rent during the whole period, calculated from *May-day* 1820: Held, that he thereby gained a settlement in S., for that the occupation under the different hirings might be connected so as to make an occupation for one whole year within the meaning of 59 G. 3. c. 50. *The King v. The Churchwardens and Overseers of the parish of Stow, E. 6 G. 4.* Page 87
2. The pauper who rented a farm in C. assigned it to P., upon trust, to cultivate it and pay the pauper's debts, &c. The lease expired in 1817, no settlement of accounts took place, but P., without the authority of the pauper, then hired a house in H. at the yearly rent of 18*l.* to which the pauper and his family removed, and they resided there for more than two years. The pauper never paid any rent or taxes, but P. rated and paid the rent and taxes: Held, that the pauper gained a settlement in H. by the occupation of the house. *The King v. The Inhabitants of Chediston, E. 6 G. 4.* 230
3. A butcher agreed to occupy a stall in a market at 2*s.* 6*d.* per week. The stall was a permanent building, with a door capable of being locked, and the key was in his possession, but he had right of access to the stall on two days in 3 Y the

to serve upon a tenement within the statute 13 & 14 Car.2. c.12. s.1. *Rex v. The Inhabitants of Caversham*, M. 6 G. 4. Page 683

4. A landlord demised a house and fixtures to a tenant, at an annual rent of 10*l.* ; and the tenant paid rates in respect of the same, but the house was not rated at 10*l.* per annum: Held, that the fixtures being parcel of the tenement demised, and the whole together being of the annual value of 10*l.*, the tenant gained a settlement by this payment of rates. *Rex v. The Inhabitants of Saint Dunstan in Kent*, M. 6 G. 4. 686

SETTLEMENT — *by serving an office.*

1. Where eight parishes were incorporated, and had a common workhouse under the 22 G. 3. c. 83., and a person was appointed by one of those parishes governor of the poor of that parish for one year, and served for three years under that appointment residing in the work-house: Held, that no one parish had power singly to appoint a governor of its poor, and that the pauper did not, by serving under that appointment, gain a settlement

voices for goods shipped on board the ship for her then intended voyage, and which goods were to be made deliverable to *B.* or his assigns, to the intent that he might dispose of the same in *India*, and invest the proceeds in other goods to be shipped on board the ship, and to be made deliverable to *B.* in *London*, or invest the same in bills, and then the net amount of such goods or bills to be in further payment of the purchase money. Covenant by *B.*, that at the expiration of three months next ensuing the arrival and report inwards of the ship in *London* from her then intended voyage, and upon *A.*'s paying the sum thereby intended to be secured, and performing the covenants therein contained, that he (*B.*) would transfer to him the ship. At the time of the execution of the agreement the ship was in the port of *London*, where she was registered. There was no indorsement of the agreement on the certificate of the registry; but in pursuance of the agreement *A.* had possession, and fully loaded her on his own account, and sailed on the voyage to *India*. *A.* paid to *B.* the two instalments, and delivered to him a bill of lading of goods valued in the invoice at 4000*l.*, which were consigned by him to merchants at *Calcutta*. *A.* left those goods at *Madras*, and then proceeded to *Calcutta*, where he relinquished the command. *A.* became bankrupt, and did not complete the purchase of the ship, nor pay the residue of the purchase money: Held, that an executory contract for the sale of a ship was within the statute 34 G. 3. c. 68. s. 15., and, therefore, that the contract for the sale of the ship was void for want of an indorsement of the agreement on the certificate of registry.

Mortimer and Others, Assignees of Merriman, a Bankrupt, v. Fleming, E 6 G. 4. Page 120

SLANDER.

1. In an action for words spoken of the plaintiffs in their trade as bankers, it was proved that *A. B.* met the defendant and said, "I hear that you say that the plaintiffs' bank at *M.* has stopped. Is it true?" Defendant answered, "Yes, it is; I was told so. It was so reported at *C.*, and nobody would take their bills, and I came to town in consequence of it myself." It was proved that *C. D.* told the defendant that there was a run upon the plaintiffs' bank at *M.* Upon this evidence, the learned judge, after observing that the defendant did not appear to have been actuated by any ill will against the plaintiffs, directed the jury to find their verdict for the defendant, if they thought the words were not maliciously spoken: Held, upon motion for a new trial, that although malice was the gist of the action for slander, there were two sorts of malice, malice in fact, and malice in law; the former denoting an act done from ill will towards an individual; the latter a wrongful act intentionally done, without just cause or excuse, and that in ordinary actions for slander, malice in law was to be inferred from the publishing of the slanderous matter, the act itself being wrongful and intentional, and without just cause or excuse; but in actions for slander *prima facie* excusable on account of the cause of publishing the slanderous matter, malice in fact must be proved: Held, therefore, in this case, that the judge ought first to have left it as a question for the jury, whether the defendant understood *A. B.* as asking for in-

formation, and whether he had uttered the words merely by way of honest advice to *A. B.* to regulate his conduct, and if they were of that opinion, then, secondly, whether in so doing he was guilty of any malice in fact. *Bromage and Another v. Prosser*, *E. 6 G. 4.*

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2. Case for slander. Declaration stated that plaintiff was treasurer and collector of certain tolls, and that defendant spoke of and concerning the plaintiff as such treasurer and collector certain words, "thereby meaning that the plaintiff as such treasurer and collector had been guilty of, &c.:" Held, that the plaintiff was bound by the innuendo to prove that he was treasurer and collector. *Sellers v. Till*, *M. 6 G. 4.* 655

STAMP.

1. An instrument in the following form: "Received of *A. B.* 100*l.* which I promise to pay on demand with lawful interest," is a promissory note.

In assumpsit by an executrix on a promissory note for 100*l.* made in 1811, and payable to her testator, and for money had, &c., it appeared on the production of the note that it had a threepenny receipt stamp, and a one pound agreement stamp, and there was indorsed upon it a receipt for a penalty of 5*l.* and 1*l.* duty. The proper stamp for such a note in 1811 was a three shilling stamp: Held, that as it appeared upon the face of the note that it had been issued without having affixed to it a stamp equal in amount to that required by law, the commissioners had no power after it had been issued to affix to it another stamp, and, therefore, that it was not receivable in evidence, either in support of the count for

SURETY.

See COMPOSITION.

TENDER.

See ACTION ON THE CASE, 1.

TITHES.

See INCLOSURE ACT.

TITLE.

See ACTION ON THE CASE, 3.

TOLL.

1. By a turnpike act, certain tolls were imposed upon every carriage, &c. drawn by horses, varying in amount in proportion to the number of horses drawing the same; and certain other tolls were imposed upon waggons and carts drawn by horses; and another toll for horses, mules, or asses, laden or unladen, and not drawing; proviso, that no more than one toll should be taken from any person for passing and repassing on the same day with the same horses, beasts, and carriages through the toll gates. A stage coach, drawn by four horses, passed through a gate erected under this act of parliament, and paid the toll. In the evening of the same day, the same coach repassed through the same gate with the same coachman, but with different horses and passengers: Held, that a second toll was not payable in respect of this carriage and horses.

By another clause of the act, it was enacted that no action should be commenced against any person for any thing done in pursuance of the act until twenty-one days' notice should be given to the clerk of the trustees, or after sufficient

satisfaction or tender thereof had been made to the party aggrieved, or after six calendar months next after the fact committed, and that every such action should be brought in the county or place where the matter should arise, and not elsewhere, and the defendant should and might at his election plead specially, or the general issue, not guilty, and give in evidence that the same was done in pursuance and by the authority of the act: Held, in assumpsit against a toll collector, brought to recover back money alleged to be exacted by him improperly as toll, that twenty-one days' notice of action ought to have been given, and that the action should have been brought in a proper county. *Waterhouse and Others v. Keen*, E. 6 G. 4.

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2. By a turnpike act, the trustees were authorised to take at each and every of the several respective turnpike gates erected on the road, the following tolls: "For every horse, mule, or other cattle drawing a carriage, nine-pence; for every horse, mule, or ass, not drawing, two-pence; for every drove of oxen, cows, &c., one shilling and sixpence per score; for every drove of hogs, sheep, &c., one shilling and four-pence per score." By another section, it was made lawful for the trustees, at a meeting to be holden for that purpose, whereof notice in writing was to be affixed on all the turnpike gates erected on the road, to lessen and reduce, and again to raise and advance all or any of the tolls thereby granted, and such tolls so reduced or advanced were to be collected as the tolls thereby granted: Held, that under this act, the trustees were authorised to reduce or advance any of the four descriptions of tolls at all the

the gates, but not to reduce or advance them at one gate and not at another. *The King v. Trustees of the Bury and Stratton Roads*, T. 6 G. 4. Page 361

TOWN CLERK.

See AGREEMENT, 1.

TRESPASS.

See MILITARY OFFICER.

1. Where a party raising a party wall *bonâ fide* intended to comply with the directions of the building act, 14 G. 3. c. 78., but did not in fact do so, and injured the adjoining house, the owner of which brought trespass: Held, that the raising of the wall was to be considered as done in pursuance of the statute, and that the defendant was entitled to the protection given by the one hundredth section. *Pratt v. Hillman and two Others*, T. 6 G. 4. 269
2. A. paid a nominal rent to the king for 1000 acres of woodland, the wood being all reserved to the crown. During four months in the year A. exercised the privilege of shooting over the land, and by his permission another person took the grass: Held, that the payment of the rent, the exercise of the privilege of shooting, and the taking of the grass, was sufficient evidence to shew that A. was in the actual possession of the land, so as to entitle him to maintain trespass.

A. occupied under a parol licence from the crown, and the rent paid by him was much less than one-third of the annual value of the land, as required by the 1 Ann. st. 1. c. 7 s. 5., he had no legal right to retain possession of the land as against the crown, but that as he occupied with the per-

mission of the crown, his possession was sufficient to enable him to maintain trespass against a wrong-doer. Semble, that a person who occupies crown lands under a parol licence is not an intruder.

A public footway over crown land was extinguished by an inclosure act, but for twenty years after the inclosure took place the public continued to use the way: Held, by *Bayley J.*, that this use was not evidence of a dedication to the public, as it did not appear to have been with the knowledge of the crown. *Harper v. Charlesworth*, T. 6 G. 4. Page 574

3. A constable arresting a man on suspicion of felony must take him before a justice to be examined as soon as he reasonably can, therefore a plea justifying a detention for three days, in order that the party whose goods had been stolen might have an opportunity of collecting his witnesses and bringing them to prove the felony, was held bad on demurrer. Semble, that a constable cannot justify handcuffing a prisoner unless he has attempted to escape, or unless it be necessary in order to prevent him doing so. *Wright v. Courst and Others*, T. 6 G. 4. 596
5. Trespass for driving a carriage against the plaintiff's son and servant, whereby plaintiff was deprived of his services, and was put to expence in obtaining his cure. The child was two years and half old, and the plaintiff might have placed him in an hospital, which would not have occasioned any expence, but preferred having him at home: Held, that the loss of service was the gist of the action, and that the child being incapable of performing any service by reason of his tender age, the action was not maintainable, particularly

ticularly as no expence had been necessarily incurred. Query, Whether the father might have maintained a special action for the expences if they had been necessarily incurred? *Hall v. Hollander*, M. 6 G. 4. Page 660

6. Trespass against three for assault and battery. Plea, not guilty by all; by the third, a justification in defence of his freehold. Replication, that he used more force than was necessary. Rejoinder, that *all the defendants* did not use more force than was necessary. Demurrer and joinder: Held, that the replication was good, and the rejoinder bad. *Morrow v. Belcher*, M. 6 G. 4. 704

TROVER.

1. Where goods were placed in the hands of a factor for sale, and he indorsed the bills of lading to the defendants, who thereupon accepted a bill for him, and he at the same time directed the defendants to sell the goods, and reimburse themselves the amount of the bill, out of the proceeds: Held, that the defendants having sold the goods, could not be sued for them in trover by the original owner. *Stiernel v. Holden and Another*, E. 6 G. 4. 5
2. A., a hop-merchant, on several days in August, sold to B., by contract, various parcels of hops. Part of them were weighed, and an account of the weights, together with samples, delivered to the vendee. The usual time of payment in the trade was the second Saturday subsequent to the purchase. B. did not pay for the hops at the usual time, whereupon A. gave notice, that unless they were paid for by a certain day, they would be re-sold. The hops were not paid for, and A. re-sold a part, with the consent of B.,

who afterwards became bankrupt, and then A. sold the residue of the hops without the assent of B. or his assignees. Account sales of the hops so sold were delivered to B., in which he was charged warehouse rent from the 30th of August. The assignees of B. demanded the hops of A., and tendered the warehouse rent, charges, &c.; and A. having refused to deliver them, brought trover. The jury found that defendant had not rescinded the contract of sale: Held, that the assignees were not entitled to maintain trover to recover the value of the hops, inasmuch as in order to maintain that action, the party must have not only a right of property, but a right of possession, and that although a vendee of goods acquires a right of property by the contract of sale, yet he does not acquire a right of possession to the goods until he pays or tenders the price. *Bloxam and Warrington, Assignees of Saxby, a Bankrupt v. Sanders and Others*, M. 6 G. 4.

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TRUSTEES OF TURNPIKE ROADS.

See ASSUMPSIT, 5.

TURNPIKE ACT.

See TOLL, 2.

VARIANCE.

See EVIDENCE, 17. 19, 20, 21. 27, 28.

VENDOR AND VENDEE.

See TROVER, 2.

1. Where A. bought of B. goods in the *East India Company's* warehouses, and left the warrants in B.'s hands, who pledged them, and

2. The goods of *A.* were seized under a *fi. fa.*, and the judgment creditor took a bill of sale from the sheriff, and afterwards sold the goods to *B.*, who put a man into possession, but the goods remained in *A.*'s house, and were used by him as before the execution. The circumstance of the execution was, however, notorious in the neighbourhood. Another judgment creditor issued a *fi. fa.* against *A.*, and the sheriff seized these goods. In trespass

ing i
perty
6 G.

See Ex

ERRATA.

- Page 610. for "*Doe d. Bosnall*," read "*Doe d. Bag*
622. in note, for "*Chilley's case*," read "*Shelli*
625. in marginal note, line 19. for "*plaintiff* ha
had not returned."
629. line 18. for "*plaintiff* had not returned," re
757. in marginal note, for "*5 G. 2. c. 119. s. 1.*"
762. for "*c. 119.*" read "*c. 19.*"
764. for "*c. 119.*" read "*c. 19.*"

END OF THE FOURTH

